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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XVII.

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AMERICAN STATE REPORTS.

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VOL XVII



CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

LONDON v. YOUMANS.

[§1 SOUTH CAROLINA, 147.]

PURCHASER, BONA FIDE, WHO IS. — A purchaser for value and without notice, from one who was a purchaser with notice, becomes a purchaser *bona fide*, and entitled to protection as such.

PURCHASER OF PROPERTY WITHOUT NOTICE OF A MORTGAGE THEREON takes title free therefrom, though his vendor purchased with notice thereof.

NOTICE OF A CHATTEL MORTGAGE CANNOT BE INFERRED from the fact that a public sale was made thereunder, in a county other than that in which the property was situated, and in which the person sought to be affected with notice resides.

APPELLATE PROCEEDINGS. — The appellate court will not consider, upon appeal, a point which does not appear to have been taken or considered by the trial court, and is not made a ground of appeal.

C. C. Tracy, for the appellant.

C. J. C. Hutson, contra.

McIVER, J. This was an action to recover possession of a steam-engine, to which, as we understand from the somewhat imperfect statement made in the case, the only defense interposed was that the defendant was a purchaser for valuable consideration without notice. The facts out of which the controversy arose are substantially as follows: One James M. Richardson, a citizen and resident of Hampton County, being the owner of the engine in question, leased certain premises in Beaufort County from one William Elliott, for the term of one year from the 1st of September, 1885, at a monthly rent of \$12.50, and placed the engine on said premises for the purpose of carrying on a rice-mill. No part of the rent having

been paid, Elliott, on the 1st of September, 1886, demanded payment of the same, when Richardson told him "the engine, boiler, and other machinery there in the store hereinbefore named were sufficient guaranty for his rent, and that the same would not be removed until his rent had been paid." Shortly afterwards, however, about the 21st of September, 1886, Elliott, discovering that Richardson had removed some of the machinery above referred to, "took actual possession for rent of the above-named engine and boiler, locked the gate, and placed watchmen in charge; that Richardson had been in possession of the above-named engine and boiler several years before, extending out to the world the idea of ownership, and that there was no record to show that plaintiff, or any other person, had any claim or interest in the aforesaid engine and boiler; that Elliott held said engine and boiler under his warrant of distress and levy some months, and upon failing to get his rents, advertised and sold in accordance with the statute, and bought said engine and boiler for an amount much less than that due for rents," and subsequently sold the same to the defendant, who removed the property to his residence in Hampton County, where it was at the time of the commencement of this action.

It appears, however, that the plaintiff held a mortgage on said property, dated 25th of August, 1885; but when the debt which it was designed to secure fell due is not stated, though the inference is, that such debt became payable some time in 1886, probably on or before the 28th of September of that year, as it is stated that about that time the mortgage was placed in the hands of one Rabb, with instructions to foreclose and sell said engine and boiler, and that about that time these facts were communicated by Rabb to Elliott, who, under the advice of counsel, "in addition to his possession as aforesaid, issued a distress warrant, and under said warrant levied on said engine and boiler, which latter levy may have been made a few days later than date of record of said mortgage." It also appears that the mortgage in favor of plaintiff was never recorded at all until the 1st of October, 1886, and then it was placed on record in the county of Beaufort, instead of the county of Hampton, where the mortgagor resided. The sale under the distress warrant was not made until the 11th of December, 1886, and in the mean time, though at what precise time — except that it was "between September and December" — does not appear, the engine and boiler were sold

under the mortgage, and bought in by the plaintiff, though the property was then in the possession of Elliott, and so remained until it was sold to the defendant, who, it is conceded, had no actual notice of plaintiff's mortgage when he bought.

Under an agreed statement of facts, the material portions of which have been copied or stated above, the case was by consent submitted to the circuit judge, without a jury, who held that two questions were presented: 1. Whether Elliott was a subsequent purchaser without notice; 2. Whether the defendant was an innocent purchaser for valuable consideration without notice; and having determined that both of these parties occupied that position, he rendered judgment dismissing the complaint.

From this judgment plaintiff appeals upon the following grounds: "1. Because his honor erred in holding, in effect, that the personal property herein referred to was liable to distress for rent due by J. M. Richardson to W. Elliott; 2. Because his honor erred in not holding that such property was not liable for rent of J. M. Richardson; 3. Because his honor erred in not holding that actual notice of plaintiff's mortgage brought home to W. Elliott, defendant's vendor, before sale to defendant, was not (?) notice to defendant himself; 4. Because his honor erred in not holding that a public sale under plaintiff's mortgage, prior to the sale to defendant, was notice to defendant of plaintiff's claim; 5. For that his honor erred in not holding that, as against a party claiming by virtue of a levy either for rent or under execution, the mortgagee (the plaintiff) was the actual owner of the property; 6. For that his honor erred in not holding that the mortgagor had no leviable interest in the chattels mortgaged."

Under the view which we take of this case, the interesting questions presented by the first, second, fifth, and sixth grounds of appeal become immaterial, and need not therefore be considered. For even assuming, for the purposes of this case, that each one of these grounds is well taken, and that Elliott cannot be regarded as a purchaser for valuable consideration without notice (though we must not be regarded as so deciding), yet the controlling inquiry remains, whether the defendant can be so regarded. In 2 Pomeroy's Eq. Jur., sec. 754, the rule is stated as follows: "If a second purchaser for value and without notice purchases from a first purchaser, who is charged with notice, he thereby becomes a *bona fide* purchaser, and is entitled to protection." In a note to that section

it is said: "The same rule applies under the recording acts. If A, without notice of a prior unrecorded deed or encumbrance, purchases from B, who had notice, his title is free." This rule has been in terms recognized and followed in the recent case of *Jones v. Hudson*, 23 S. C. 501, where other authorities are cited. Applying this rule to the present case, if the defendant, who was the second purchaser, had no notice of the plaintiff's claim at the time he bought from Elliott, he will be protected, whether his vendor, Elliott, had notice or not. The property at the time he bought was in the possession and under the control of Elliott, and had been for several years in the possession and under the control of Richardson, from whom Elliott acquired it; and surely with these *indicia* of ownership of property of that class, the defendant should be protected in his purchase against unrecorded liens or claims in the hands of the plaintiff or any one else, of which he had no notice.

So that the only remaining inquiry is, whether the defendant had notice. It is conceded that he had no actual notice at the time he bought, and the mortgage having been recorded in the wrong county, certainly could not affect him with constructive notice. It is urged, however, that the public sale under plaintiff's mortgage, prior to the sale to defendant, was notice to defendant of plaintiff's claim. Exactly when and where such sale took place does not appear, but as the mortgaged property was not removed from Beaufort County to the county of Hampton until after the sale to defendant, the sale must have taken place in Beaufort. Now, surely the sale in Beaufort of personal property under a mortgage cannot be regarded as any notice whatever to the defendant, who resided in Hampton County. The citizens of one county will certainly not be presumed to know what is going on in another county. But however this may be, it is quite clear that a public sale under a chattel mortgage, unless knowledge of it is brought home to the party to be affected, cannot be regarded as such notice as would supersede the necessity for registration. In *City Council v. Page*, Spear Eq. 211, 212, Harper, chancellor, after advertising to the distinction between the character of notice to supply a defect of registration and to rebut an equity, lays it down as the well-established rule, "that to supply the want of registration the notice must be full, explicit, and clearly proved. . . . *Lis pendens*, which is notice to rebut and equity, will not supply the want of registration."

The appellant has raised another point in the argument here, which, so far as appears, was not made in the circuit court, and certainly is not presented in any of the exceptions; and for this reason we have been careful to set out fully the grounds of appeal. That point is, that it does not appear that defendant actually paid the purchase-money at the time he bought the property in question, which, of course, is necessary to support the plea of purchase for valuable consideration without notice. But as no such point appears to have been taken or considered in the circuit court, and is not made in any of the grounds of appeal, which only present questions as to the matter of notice and of the liability of the property to seizure under the distress warrant, it cannot be considered here. The circuit judge having determined that the defendant was an innocent purchaser for valuable consideration without notice, we are bound to assume that every fact necessary to sustain such a plea was made to appear, except those specially pointed out as wanting by some exception; and certainly there is no intimation in any of the grounds of appeal that it did not appear that defendant had actually paid the purchase-money before he acquired notice of plaintiff's claim.

The judgment of this court is, that the judgment of the circuit court be affirmed.

BONA FIDE PURCHASER, WHO IN. — A *bona fide* purchaser is one who purchases without notice, for value: Note to *Arnold v. Hagerman*, 14 Am. St. Rep. 725.

CHATTEL MORTGAGES — NOTICE. — A chattel mortgage must be recorded in the county where the mortgagor resides, and also where the property mortgaged is located: *Pollak v. Davidson*, 87 Ala. 551. Instruments to constitute constructive notice must be recorded in the county designated by statute for their record: *Aiford v. Jones*, 71 Tex. 519. In *Hudmon v. Du Bose*, 85 Ala. 446, it was decided that a mortgage of growing crops recorded in the county where such crops are growing is constructive notice of the mortgage even to a purchaser in adjoining counties.

APPELLATE PRACTICE. — The appellate court will not notice errors not excepted to in the court below: Note to *Chapman v. City Council*, 13 Am. St. Rep. 685, 686.

MARINES v. GOBLET.

[81 SOUTH CAROLINA, 153.]

ESTOPPEL. — IF THE OWNER OF LAND DELIBERATELY STANDS BY FOR YEARS and without objection sees persons buying the land and making improvements thereon under the supposition that they have a good title, he becomes estopped to set up his title against such purchasers.

ACTION of John and Luke Marines to recover possession of land from F. Goblet and his tenant. The land of the plaintiffs and of the defendant Goblet were adjacent to each other, and the piece in controversy was on and near the boundary line. The defendant Goblet claimed to have purchased the land in good faith and for value, and to have built a house upon it and cultivated and improved it. Judgment for the plaintiffs. The defendants appealed.

Smythe and Lee, for the appellants.

W. St. J. Jervey, contra.

SIMPSON, C. J. The action below was brought to recover a lot of land located in Christ Church parish, alleged to belong to the plaintiffs and in the possession of the defendants. The defendant "denied that the plaintiffs, their ancestors, predecessors, or grantors, had been seised or possessed of the premises in question, or of any part thereof, within ten years before the commencement of the action, and alleged that he, his ancestors, predecessors, and grantors, had held and possessed the said premises adversely to the title of the plaintiffs for ten years at least past before the commencement of said action, under a claim of title in fee, exclusive of any other right." At the trial the defendant requested his honor to charge: "That if the jury find that the plaintiffs deliberately stood by for years and without objection saw Goblet or others buying the land in dispute, and making improvements thereon, under the supposition that they had a good title, then the plaintiffs will now be estopped to set up their claim against them." This his honor declined to charge, saying: "That does not state sufficient facts to raise the rule of estoppel"; referring to the case of *Phinney v. Johnson*, 13 S. C. 25, as containing the law upon this subject. From this refusal of his honor to charge as requested, the case is now before us on appeal.

It will be seen, from the statement made above, that the question before us is, not whether the facts testified to on the trial were sufficient to constitute an estoppel, but whether

the facts stated in the request to charge, if found by the jury as facts of the case, would amount as matter of law to an estoppel. The first question was a question of fact involving the sufficiency of the evidence introduced, and was alone for the jury, but the second raised a question of law, upon which it was proper for the judge to charge, and upon which he did charge; and therefore the correctness of his charge is the only question in the case.

There are several kinds of estoppel, and among them is the estoppel *in pais*,—to wit, estoppels by conduct, etc.,—to which class this case belongs. That class, therefore, is the only class which need be considered here. Without going into an elaborate discussion of this character of estoppels, we think it will be sufficient for the purposes of this case to refer to the case of the *Lessee of Tarrant v. Terry*, 1 Bay, 241, which is the first case in our own reports upon this subject,—a case in which the facts were very similar to those presented in the defendant's request to charge, and where the court ruled that the plaintiff had forfeited his claim to the land in dispute. Bay, J., said: "That with respect to the subsequent conduct of Lewis, who was in the neighborhood, and saw Tarrant erecting his mill, under an impression that the land was included in his grant, without once hinting that the land was his, or forbidding him from going on, was of itself such conduct, even if there had been no fraud in the survey, as would have forfeited his claim to the land in dispute."

We do not find that this principle has been at all modified or weakened by any subsequent case in this state. The case referred to by his honor, *Phinney v. Johnson*, 13 S. C. 25, did not have that effect. That was a case of claim for dower, where the land had been sold under an execution against the demandant as administratrix of her deceased husband, in which land she afterwards claimed dower. This claim was resisted in part on the ground of estoppel, as she gave no notice of her claim when the land was sold. The probate judge, however, found, as matter of fact, "that the purchasers who successively took title under the sheriff's deed had knowledge of the petitioner's claim of dower in the land sold," and it was upon this fact that the defense of estoppel was overruled.

The English case of *East India Co. v. Vincent*, 2 Atk. 83, and which was cited in the case in Bay, *supra*, may also be cited as authority here. In that case, Lord Hardwicke said: "There are several instances where a man has suffered an-

other to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conversant of his right, and the person building had no notice of the other's right, in which the court would oblige the owner of the ground to permit the person building to enjoy quietly and without disturbance."

Now, we do not know the character of the testimony introduced in the trial below, nor how far the defendant may have made out his defense of estoppel, nor is that a question which in any event could come within our province; and therefore we decide nothing on that subject. But we think that the defendant was entitled to a ruling from the trial judge, that if the jury found the facts of the case as stated in the request, that then an estoppel was made out. The request stated the fact of the plaintiffs not simply standing by in silence, seeing the improvements of the defendant going up, but deliberately doing so, the defendant acting under the supposition that he had a good title to the land. This, it seems to us, was at least as strong if not stronger than the case of the *Lessee of Tarrant v. Terry*, 1 Bay, 241, and should have been charged.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded.

ESTOPPEL IN PARI ORDINARILY CANNOT ARISE, except when justice to the rights of others demands it: *Madden v. Louisville etc. R'y Co.*, 66 Miss. 258; *State v. Churchill*, 48 Ark. 426. One who knowingly causes another to believe in the existence or non-existence of a certain fact, believing which the latter alters his previous condition, the former is estopped to deny the existence or non-existence of such fact: *Tousley v. Board of Education*, 39 Minn. 419; *Nicholas v. Austin*, 82 Va. 817. So where one knowingly permits another to purchase land, and make improvements thereon, under supposition that he is owner thereof, he will be estopped by his silence from asserting his legal rights against such purchaser: *Forbes v. McCoy*, 24 Neb. 702; *Gill v. Hardin*, 48 Ark. 409; *Stone v. Tyree*, 30 W. Va. 687; *Powers's Appeal*, 125 Pa. St. 175; 11 Am. St. Rep. 882; *Ratcliff v. Bellfonte Iron Works*, 87 Ky. 559; *Reichert v. Railway Co.*, 51 Ark. 492; *Powers v. New Haven*, 120 Ind. 185; *Blount v. Guthrie*, 99 N. C. 93; *Guest v. Guest*, 74 Tex. 664. But silence, to raise an estoppel, must be silence with a knowledge of the existing facts: *Van Horn v. Overman*, 75 Iowa, 421; *Bartlett v. Kauder*, 97 Mo. 356; *Thor v. Olson*, 125 Ill. 365; *George v. Swafford*, 75 Iowa, 491.

HODGE v. FABIAN.

[31 SOUTH CAROLINA, 212.]

PROBATE SALES. — IF ON A PROPER PETITION a probate judge orders real estate to be sold, persons who were parties to the proceeding, and duly served with process, cannot avoid a sale made thereafter, on the ground that, as appears by the result of the sales made, it was not necessary to sell all the property to pay the debts, for the payment of which the sale was ordered to be made.

COLLATERAL ATTACK ON AN ORDER OF THE PROBATE JUDGE DIRECTING A SALE cannot be successfully made when he had jurisdiction of the subject-matter and of the parties. Jurisdiction over the subject-matter attaches on the filing of a petition sufficient in form.

ACTION by Elvira R. Hodge, distributee of the estate of James E. Fabian, deceased, to set aside sales made by the administrator, and to have the property sold either partitioned or resold. The administrator and the purchaser at this sale were parties defendant in the action. Judgment for the defendants.

J. C. De Treville, for the appellant.

Howell, Murphy, and Farrow, contra.

McGOWAN, J. As well as can be gathered from a voluminous brief, in indistinct manuscript, the leading facts of this case are as follows: In the year 1882, James E. Fabian, of Colleton, died intestate, seised and possessed of a small estate of realty and personalty, and leaving as his heirs and distributees seven children, viz., Elvira R. (now Hodge), the plaintiff, John M., James T., George B., Franklin, Claudius D., and Amanda B. Fabian, of whom Franklin, Claudius, and Amanda are still minors. John M. Fabian administered upon the personal estate, and finding that it was not sufficient to discharge the debts of the intestate, on December 1, 1882, he filed a petition in the probate court of the county as administrator, stating, among other things, that the intestate, at the time of his death, was seised and possessed of two houses and lots—lots Nos. 24 and 26—in the plan of the town of Ridgeville, and also a parcel of land, containing twenty-nine (29) acres, more or less, and praying that the said lots and small parcel of land should be sold, and the proceeds thereof, or as much thereof as may be necessary, be applied to the debts of his intestate.

A copy of the probate record was in evidence, and showed that the plaintiff, whose name at that time was Elvira R. Hill,

and not, as now, "Hodge," and the other adult children, were summoned and regularly made parties. None of the defendants answered but the minor children, and the probate judge, John B. Stokes, Esq., decreed by default, "that as it appears that the personal estate of the intestate is not sufficient for the payment of the debts of the estate," and on proof of the intestate's title to the two lots (Nos. 24 and 26), he ordered those lots sold for cash in aid of the personalty in the payment of debts; and then proceeded as follows: "There being some dispute as to the title of the estate in the remaining twenty-nine acres mentioned in the complaint, the court reserves that question for future consideration," etc. The sale of the two lots ordered took place, and we suppose the proceeds were applied to the debts, as we hear nothing more of these lots. After the sale of these lots, the probate judge, on January 7, 1884, made a supplemental decree, by which he directed that the remaining parcel (twenty-nine acres) should be divided into lots not less than one nor more than five acres each (with an unimportant exception), and sold upon the terms of one third cash, and the remainder in two equal annual installments. The land was divided and sold as directed, and at that sale the defendants, Baxter, Cummings, Way, and Mood, became purchasers of some of the lots, and having complied with the terms of sale, received titles, and were let into possession of the same.

These purchasers were made parties, and stoutly resisted the plaintiff's prayer to set aside the sales, claiming that they had purchased and paid for their respective lots at a judicial sale ordered by the probate judge, under proceedings in all respects formal and regular, the court having jurisdiction of the subject-matter, and with all proper parties before it; that the plaintiff having had regular notice of the probate proceeding, and having made no objection, but, on the contrary, having acquiesced therein, and actually received her full share of the excess of the sales over paying the debts of the estate, she was bound thereby, and estopped from averring against the sale; and that, besides, she had received a lot valued at seventy dollars, which was assigned to her at her request.

It was referred to John D. Edwards, Esq., as special master, to take the testimony and report his conclusions, both of law and fact. He did so, and made a long and very careful, clear, and full report, in which, after stating the facts and the law, he said: "I find, therefore, that the proceedings in the probate

court were regular on the face of the record, and cannot be thus assailed; but even if not entirely regular, there is not sufficient apparent infirmity as to render them void or susceptible to collateral attack. I hold, therefore, that the action is not maintainable, and should be dismissed," etc. Upon exceptions, this report was confirmed by Judge Norton, who made it the judgment of the court, remarking that "the infants do not seek any relief in the action, and it is not adjudged whether or not, upon proper proceedings begun for that purpose, they would be entitled to some relief."

From this decree the plaintiff appeals, upon the following grounds:—

"1. Because his honor erred in not sustaining plaintiff's exceptions to the master's findings of fact,—said findings not being in accordance with the testimony taken.

"2. Because plaintiff's exceptions to the eighth finding of fact should have been sustained, there not being sufficient evidence to prove that the plaintiff received as an heir at law a house and lot, at the valuation of seventy dollars.

"3. Because plaintiff's exception to the master's fourth finding of fact, viz., that the proceedings were regular and according to law, and that a copy of the petition and summons were served on the plaintiff, should have been sustained, there being no evidence to support his finding.

"4. Because plaintiff's exception to the seventh finding of fact, 'that George D. Baxter, one of the defendants, was the husband of one of the heirs,' should have been sustained, there being no testimony to support the finding.

"5. Because his honor erred in not sustaining plaintiff's exceptions to the master's conclusions of law, there not being sufficient facts on which such conclusions could be based.

"6. Because his honor erred in not decreeing that the probate judge had exhausted his jurisdiction at the time of his second decree, there being no necessity for the same.

"7. Because the exception to the third conclusion of law should have been sustained, as it was error to hold that the probate judge had the discretion vested in him to sell so much of the lands, and in such manner, as may seem to him best; whereas the law says, 'so much as may be necessary,' etc.

"8. Because his honor erred in not decreeing that the probate court was without jurisdiction in making the sale of the thirty acres of land, and that said sale was void.

"9. Because his honor erred in dismissing the complaint without granting the relief prayed for, and should have referred the case back to the master to correct his findings of fact and errors of law."

Exceptions 1 and 5 state no specific objection, and therefore are too general to be considered.

Exceptions 2, 3, and 4 relate to findings of fact by the special master, concurred in by the circuit judge; and in such case it is well known to be the rule of this court not to disturb the finding unless manifestly against the weight of the evidence. Whether G. Baxter did, or did not, marry one of the children of the intestate, was really of no importance in the case. We have read the record of the probate proceedings carefully, and we entirely concur with the master and circuit judge, that the plaintiff was regularly served in that case under the name of "Elvira R. Hill." Strobel, the officer, so swears; and we further concur, upon the testimony of the probate judge, Stokes, that a lot, appraised at seventy dollars, was assigned to the plaintiff, and that she also received money advanced by him, said Stokes.

Exceptions 5, 6, 7, and 8 substantially make the point, that, conceding the jurisdiction of the probate judge, in the first instance, to sell the lands of the intestate in the proceeding of *John M. Fabian, administrator, v. Elvira R. Hill et al.*, yet such jurisdiction was exhausted by the first order of sale, which order was in the nature of a final judgment, and no further order of sale under the proceedings could be made without a new case and fresh service of the parties. If the probate judge had been merely the appointee of another court, to sell certain portions of the estate, which had been done, there would have been some force in the view. *Ex parte Knight*, 28 S. C. 484. But it will be observed that he was also the judge, and that the first order of sale did not purport to be a final judgment; that the petition prayed for the sale of the whole land in aid of the personalty, and that the plaintiff, who was a defendant in that proceeding, allowed the prayer of the petition to be taken by default against her, and the probate judge only refrained from selling all the land at the first sale, for the reason that there was "some dispute" whether the title to the parcel not then sold was in the estate, — and on that account alone "the court reserved the question for future consideration." Afterwards, probably finding that the estate had title, the second parcel was sold. It seems to us that those

who were parties to that application have no right to complain that the sale, which they had allowed to be ordered and adjudged, should be made at different times, and that we must consider the matter precisely as if all the lands, according to the prayer of the petition, had been disposed of at the first sale.

But it is further urged that if it must be considered that there really was but one order of sale, more lands were sold, as it turned out, than was necessary for the payment of the debts, and to the extent of such excess the probate judge did not have jurisdiction, and, as a consequence, the sales were absolutely void; that is to say, they were part good, but in part bad, depending upon the result of the sales. Section 40 of the code declares that "wherever it shall appear to the satisfaction of any judge of probate that the personal estate of any person deceased is insufficient for the payment of his debts, and all persons interested in said estate being first summoned before him, and showing no cause to the contrary, such judge of probate shall have power to order the sale of the real estate of such person deceased, or of so much thereof as may be necessary for the payment of the debts of such deceased person, upon such terms and in such manner as he may think best," etc. This act gives to the probate judge important judicial functions. Whenever it shall appear to "his satisfaction" that the personal estate is insufficient for the payment of the debts of an intestate, he is to judge of the necessity of the sale, — lands to be sold, etc.

Although the insufficiency of the personal property for the payment of the debts is the foundation of his jurisdiction, we cannot suppose that his judgment in the matter must go for nothing, and that his order of sale *ipso facto* must be absolutely void the moment the proceeds of sale touch the point of full payment of the debts. It is not always easy to foresee what lands will sell for at public auction, and the construction contended for would emasculate the judicial powers given to the probate judge, — tend to great confusion, make titles uncertain, and destroy the value of such sales, by raising a well-grounded distrust of them. We think the inquiry should be, whether the probate judge had jurisdiction of the subject-matter and of the parties, and if so, that his order of sale must be regarded as the judgment of a competent court upon a matter within its jurisdiction, and not subject to collateral attack: See *Turner v. Malone*, 24 S. C. 398. "The jurisdic-

tion of the court [probate] over the subject-matter attaches on the filing of a petition sufficient in form. The matter stated in the petition may or may not be true. The heirs, when jurisdiction over them is obtained, may be treated as entering a general denial. The order of the court granting or refusing the prayer of the petition is in the nature of a judgment conclusively establishing that the sale is or is not necessary. If erroneous, it must be corrected by appeal, or some other appropriate proceeding. It cannot be collaterally avoided by showing that the petition was false": Freeman on Void Judicial Sales, sec. 14. "If upon hearing of the petition the court is 'satisfied' that a proper case exists, it will enter an order or license for the sale of the land. If the court had jurisdiction, this order, until vacated or reversed, is binding on all parties in interest. The purchaser under it is in no danger of losing his title by proof being made that the order was erroneously given. It cannot be collaterally attacked for error, fraud, or irregularity, if the court had jurisdiction," etc. Freeman on Void Judicial Sales, sec. 20, and notes.

The judgment of this court is, that the judgment of the circuit court be affirmed.

AS TO THE JURISDICTION OF PROBATE COURTS TO SELL REALTY of decedents, and the conclusiveness of proceedings upon collateral attack, see *Goodwin v. Sims*, 86 Ala. 102; 11 Am. St. Rep. 21, and note 27, 28.

BLAIR v. BLACK. ELIAS v. BLACK.

[31 SOUTH CAROLINA, 246.]

INDIVIDUAL CREDITORS OF A MEMBER OF A PARTNERSHIP ARE NOT ENTITLED TO PRECEDENCE OVER PARTNERSHIP CREDITORS, after the latter have exhausted their remedy against the partnership assets. The property of one who has been a member of the partnership is liable for his partnership debts to the same extent as for his individual debts, except that the holder of the partnership debts may be required to exhaust his remedy against the firm before resorting to the property of its individual members.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS which directs that partnership creditors shall not receive anything out of the assets of the assignors until the individual creditors are fully satisfied gives an unlawful preference to the individual creditors, and is therefore void under the statutes of South Carolina.

ACTION by the creditors of Black, Carpenter, and Davies, against them and John G. Black, to set aside deeds of assign-

ment made by him to them. The defendants had judgment in the trial court.

W. B. McCaw and C. E. Spencer, for the appellants.

Hart and Hart, contra.

McGOWAN, J. On January 29, 1889, James W. Black and Jacob K. Carpenter, of the old mercantile firm of Black and Carpenter, and also of its successor, Black, Carpenter, and Davies, made an assignment of both their individual and partnership property, for the payment of their debts, to John G. Black as assignee and trustee. J. L. Davies, one of the latter firm, did not sign the original deed of assignment, being absent at the time it was executed, but ratified it some days later, and indeed, executed another deed, conforming substantially to the first. The assignment provided that the property and assets of the individual members of the respective firms should be first applied to the payment of the individual debts of the members of the firm; and that the property and assets of the firms respectively should be first applied to the debts of the partnership; and that if a surplus should remain after paying the debts of the one class, then such surplus should be paid to debts of the other class, and so reciprocally of the other class. The assignment also provided that if there should not be sufficient funds to pay the debts, the assignee should pay them ratably, or such as should, within thirty days from the date of the assignment, agree to accept the terms of it, and to release the parties from all liability on their debts and claims, etc.

The cases stated above were instituted by creditors of the respective firms for the purpose of setting aside the deed of assignment, and, being identical in object and purpose, were consolidated, and heard together. Several grounds were urged, sufficient, as alleged, to set aside the assignment, and subject the property to the claim of creditors according to law, but, from the view which the court takes, it will not be necessary to consider any of the objections, except the one chiefly relied on by the assailing creditors, viz., that, in violation of section 2014 of the General Statutes, which denounces assignments giving preferences as "absolutely void," this assignment gives undue and illegal preference to individual over copartnership creditors, in excluding the partnership creditors (after exhausting the partnership assets) from coming in and participating with the individual creditors in the individual property

of the members of the different firms; the proposition relied on being, that, under the law of this state, the individual creditors are not entitled to be paid first out of the individual property, but have only an equity to require that the partnership creditors should exhaust the assets of the firm, and after that is applied, they are then entitled, as to any balance due them, to share equally and ratably with the individual creditors in the individual assets. While, on the other hand, in support of the assignment, it is urged that the rule is, that the joint debts are primarily payable out of the joint effects, and are entitled to a preference over separate debts; and so, in the converse case, the separate debts are primarily payable out of the separate effects, and as to that, possess a like preference; and the surplus only, after satisfying such priorities, can be reached by the other class of creditors. So that really the only question involved is one purely of law. What was the law of this state upon the subject when the assignment was executed?

The cause came on to be heard by Judge Kershaw, who, making a full and interesting review of the authorities, both in the English and American courts, in law and in equity, held that the question as to the priority of the individual over the partnership creditors, in the individual property of the members of the firm, was still an open question in this state; and "furthermore, that the departure from this settled rule of administration of partnership assets, where there are individual claims and individual property, is wholly founded upon the case of *Wardlaw v. Gray*, Dud. Eq. 110, and that wholly upon a total misconception of the English cases cited to support it. With great deference to the opinions of the eminent jurists whose decisions are here reviewed, I am impelled to the conclusion that, in the case under consideration, the individual property is first applicable to the individual debts, and that the provisions upon that subject in the assignment are in strict conformity to the established rule, and therefore constitute no improper preference,"—and dismissed the complaints.

From this decree the plaintiffs, partnership creditors, appeal to this court upon the ground, *inter alia*, that it was error of law to hold "that, as between the partnership creditors of a firm and the individual creditors of its members, the individual assets are first liable to individual debts before any application thereof may be made to partnership debts; and for not holding that if, after applying partnership assets to

partnership debts, any portion of such debts should remain unsatisfied, such portion should come in ratably with the individual debts of the several members as against their individual assets," etc.

The question is certainly an important one, which, in the affairs of business life, may arise daily, and it should be, if it has not already been, clearly and fully settled, so that all may know what the law is, to which their actions should be conformed. It is true that there has been much discussion, and some difference of opinion, on the subject involved, not, as it seems to us, arising so much from the inherent difficulty of the subject, as from an artificial rule originally adopted in the English bankrupt courts, mainly, as it would seem, on account of its simplicity and convenience of application, viz., that partnership creditors are entitled to partnership property, and, *e converso*, individual creditors are entitled to individual property, a rule of which Judge Story says: "It is not too much to say that it rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence": Story on Partnership, 577.

As we understand it, no rule upon the subject has ever been declared by positive statute, either in England or America; but whatever rule there may be has grown up entirely from the *dicta* of elementary writers and adjudications of the courts, supposed to be founded on some principle. But so far as concerns this "rule of reciprocity," as it is sometimes called, it does not seem to us to have been based upon any principle or general equities of the parties. All agree that the partnership creditors have an equity to exhaust the partnership assets, for the double reason that they have two funds, and the individual members have no interest until the partnership is settled. But the same cannot be said of the individual creditors. They are not creditors of the firm at all, but only of their individual debtor, whose individual property, including his clear share of the firm, is liable for all his debts alike, both partnership and individual. It strikes us that there is nothing in the relations or the equities of the respective classes to authorize or justify the application of the convenient procrustean rule of "reciprocity."

But it is argued that the circuit decree is in conformity with the English rule, and we should follow it without regard to its reason or equity, and disregard our own cases which have made a departure from it, for the sole reason that it was error

to make that departure, and it should be corrected by returning to the rule. Without going back to ascertain what is the precise rule adopted in the English courts of bankruptcy and chancery, it is quite clear that as far back as the case of *Wardlaw v. Gray*, Dud. Eq. 110 (1837), cited in the circuit decree, the doctrine was announced in this state "that a partnership creditor has the right to resort either to the partnership property or to the separate property of the parties; but as a party having two funds, he may be compelled by the separate creditors of one of the partners to exhaust the partnership property before he proceeds against that of an individual partner," etc. Whether this decision did or did not run counter to what is said to be the English rule upon the subject, it is quite as clear that it has never been expressly overruled; but, on the contrary, has been recognized and followed, and at the time of the execution of the assignment under consideration was, as we think, the law of the state. In *Gowan v. Tunno*, Rich. Eq. Cas. 369 (1832), it was held that "though partnership effects should be first applied to partnership debts, yet after these are exhausted a judgment against the partners as such binds the separate estate of each partner from its date."

In *Fleming v. Billings*, 9 Rich. Eq. 149 (1856), it was held that "copartnership creditors are first to be paid out of the copartnership fund, and if that prove insufficient, then they are to come in with the private creditors (respect being had to liens), as against the individual property of the copartners." In *Gadsden v. Carson*, 9 Rich. Eq. 252, 70 Am. Dec. 207 (1857), it was held that "the individual creditors of a partner have not such exclusive right to be paid out of his individual property as to render fraudulent an assignment of it for the benefit of the creditors of the firm. Partnership creditors having two funds to which they can resort, and individual creditors of the partners having but one, — the private property of the debtor (including any balance which may remain to him from the firm after its affairs are settled), — such individual creditors have an equity to compel the partnership creditors to resort first to the partnership assets; but after they are exhausted, the partnership creditors have as good right to be paid out of the private property of a partner as his individual creditors," etc. In this case, Chancellor Johnston remarked that it "was in conformity to *Wardlaw v. Gray*, Dud. Eq. 110, with which we see no reason to be dissatisfied."

In *Wilson v. McConnell*, 9 Rich. Eq. 500 (1857), it was held

that "where a copartner, having a separate estate, dies, the copartnership creditors have the right first to exhaust the copartnership estate, and if that proves insufficient to pay their demands, then they are to be paid from the separate estate of the copartners *pro rata* with his separate creditors." In *Adickes v. Lowry*, 15 S. C. 128 (1880), it is true that an intimation is given that the question might be still open, but that was not intended to decide anything. The remark was: "But even if this were so, there would still remain the very important and interesting question whether the separate creditors of Bratton would not have in equity a preference over the partnership creditors to the separate assets of Bratton, etc. But inasmuch as this question was not raised in the court below, and has not been argued here, we do not propose to enter upon its consideration now," etc.

In *Hutzler Bros. v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687, it was held "that partnership creditors, after exhausting partnership assets, are entitled to share the separate property of the partners *pro rata* with unsecured individual creditors." The chief justice reviewed all the authorities, saying, among other things: "We think the true doctrine is as stated by the circuit judge with respect to the right of the separate creditors, if any equity exists in his behalf, such as two funds, . . . to throw the copartnership creditors on the partnership assets in the first instance, but after the partnership assets have been fully and fairly exhausted, to come in *pro rata* with the separate creditor. This seems to be the weight of authority with us. Besides, a debt contracted by a copartnership is not only a debt of the firm, but a debt, in substance, of each individual member of the firm, and the property of the firm and of each member is liable for it. But the property of the firm is not liable for the separate debt of a member; only the interest of a member is liable, which is nothing until the firm debts are paid," etc.

We think this case finally settled the law in this state. But as if to put the matter beyond all dispute, the very last work upon the subject of partnership, published this year (1889), expressly approves and cites from this case, as containing the proper exposition of the law upon the subject, both on principle and authority. The author says: "The insolvent, by his inability to meet his liabilities, is not the less, but all the more, a debtor. He owes to his creditors, not the property itself, nor any other asset, but merely the price of the prop-

erty. The debt is personal, without any lien or preference for its payment out of the debtor's estate. The individual partner is, however, not less liable for a firm debt than is the firm itself. The several liability of the partners is no less a constituent of the partnership obligation than is their joint obligation. Both spring from the root of partnership. The joint creditors, therefore, are entitled at law to share the separate estate of a partner with his individual creditors," etc: See *Parsons on Partnership*, sec. 108; citing *Hutzler Bros. v. Phillips*, 12 S. C. 136; 4 Am. St. Rep. 687; and other cases.

We have not the least idea that the parties intended to do anything wrong, but the assignment was not in conformity with the law as we understand it, and had the effect of creating preferences not allowed by law.

The judgment of this court is, that the judgment of the circuit court be reversed, and the cases remanded to the circuit court for such further proceedings as the parties may be advised, in accordance with the conclusions herein announced.

PARTNERSHIP CREDITORS MAY SHARE PRO RATA in the individual property of the partners, after exhausting the partnership assets: *Hutzler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687; *Gaddesen v. Carson*, 9 Rich. Eq. 252; 70 Am. Dec. 207, and note. Compare *Scudder v. Delashmut*, 7 Iowa, 39; 71 Am. Dec. 423, and note.

TRANSFER OF PARTNERSHIP PROPERTY BY THE COPARTNERS, or by one partner with the consent of the others, to pay individual debts, is fraudulent and void as to the firm creditors, unless the firm is solvent and sufficient property remains to pay the partnership debts: *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712. Assignment by partners which gives preferences to separate partners for debts they have against the partnership before paying other creditors is void: *Goddard v. Hapgood*, 25 Vt. 351; 60 Am. Dec. 272. But in *Nye v. Van Huesan*, 6 Mich. 329, 74 Am. Dec. 690, it was held that preference to individual debts does not render void a partnership assignment for the benefit of creditors.

SIMMONS v. REID.

[21 SOUTH CAROLINA, 239.]

SETTING OFF JUDGMENTS. — A judgment in favor of the defendant may, on motion, by order be set off against a judgment previously rendered in favor of the plaintiff. The power to so set off judgments is a common-law power, not derived from nor regulated by the statute of set-off or of discount.

JURISDICTION TO SET OFF ONE JUDGMENT AGAINST ANOTHER IS EQUITABLE IN ITS NATURE, and the application therefor is addressed to the sound judicial discretion of the court, in the exercise of which equitable rights of persons not parties to the suit will be considered and protected.

SET-OFF OF ASSIGNED JUDGMENT. — The court will not order a judgment to be set off against one in favor of the defendant, when the plaintiff had assigned it to his attorney to secure the payment of the latter's professional service, and the attorney, when he took the assignment, had no notice of the existence of the judgment which the defendant seeks to set off.

Moorman and Simkins, for the appellant.

O. L. Schumpert, *contra*.

McIVER, J. Simmons having recovered a judgment in a trial justice court for the delivery of a horse and ten dollars damages, or eighty dollars if the horse be not delivered, and costs, Reid appealed therefrom to the circuit court. The appeal was heard during the regular term for November, 1886, and on the 6th of December, 1886, Judge Fraser delivered his judgment, modifying the judgment appealed from, by reducing the alternative judgment from eighty to sixty dollars. It having been discovered that the official term of Judge Fraser had expired before the 6th of December, 1886, and he having been re-elected in the mean time, an extra term of the court was held on the 31st of December, 1886, for the purpose of re-signing judgments rendered after his former commission had expired. At the extra term, upon notice, Reid applied to the circuit judge for an order to set off a judgment by confession before a trial justice, entered the 24th of September, 1883, in favor of Reid against Simmons, a transcript whereof was filed and entered in the clerk's office on the 28th of December, 1886; but the circuit judge, holding that he could not hear an original motion at an extra term, declined to consider it.

At the next regular term, in February, 1887, the application was renewed on notice. In response to this application, Simmons, the plaintiff herein, showed cause: 1. That on the 6th of December, 1886, in consideration of professional services rendered herein, the said plaintiff assigned this judgment to his attorney, in pursuance of a prior parol agreement made and entered into at the time of the commencement of the suit in the trial justice court; 2. That subsequently, to wit, on the 24th of December, 1886, the said attorney, for valuable consideration, assigned said judgment to one Pool, who is now the legal owner thereof, and is not a party to these proceedings; 3. That said assignment was filed with the judgment roll and lodged with the execution herein on the 24th of December, 1886; 4. That the judgment by confession before the trial justice now sought to be set off against the judgment herein

is not a valid judgment; and even if so, it cannot be set off as against third parties purchasing for valuable consideration without notice. The circuit judge refused the motion, on the sole ground that the assignment of the judgment herein was sufficient to bar the appellant's right of set-off.

From this order the defendant, Reid, appeals, alleging in general terms error in such refusal. Strictly speaking, we might decline to hear this appeal, as there are no specific errors pointed out, nor are there any indications as to where the error alleged lies. But waiving this, we will proceed to consider the points made in the argument submitted in behalf of appellant.

There can be no doubt that the court of common pleas has jurisdiction in a proper case, and upon a proper showing, to require a judgment previously obtained by a defendant against a plaintiff to be set off, *pro tanto*, against a judgment subsequently obtained by the plaintiff against the defendant; and there is as little doubt that this may be done by motion on a rule to show cause: *Williams v. Evans*, 2 McCord, 203; *Duncan* ads. *Bloomstock*, 2 McCord, 318; 13 Am. Dec. 728. But it is equally well settled that this is a common-law power, not derived from or regulated by the statutes of set-off or discount. The jurisdiction for this purpose is equitable in its nature, and the application is addressed to the sound judicial discretion of the court. In addition to the cases above cited, see *Tolbert v. Harrison*, 1 Bail. 599; *Low v. Duncan*, 3 Strob. 195; and *Meador v. Rhyne*, 11 Rich. 631; in which last-cited case it is said that the court, in exercising this jurisdiction, will always regard the equitable rights of persons not parties to the suit. It is therefore obvious that section 133 of the code, relied on by counsel for appellant, has no application.

We see no reason to doubt that the circuit judge, in refusing this motion, proceeded upon the principle which, as we have seen, regulates the exercise of this jurisdiction; and certainly we cannot say that there was any abuse of his discretion in refusing the motion. On the contrary, we think it was properly exercised. Here the attorney for the plaintiff in good faith, — as we must assume in the absence of any evidence to the contrary, — with a view to secure compensation for his services, which had proved to be effective, took an assignment of the judgment, the fruits of his services, when, so far as appears, he had no notice either actual or constructive of the judgment previously obtained by confession in the trial jus-

tice court by Reid against Simmons, — for the transcript of that judgment was not filed in the clerk's office until after the assignment was executed, — and then afterwards assigned the judgment for value to a third person, who was alike without notice. Under these circumstances, it seems to us to have been a very proper exercise of discretion on the part of the circuit judge to refuse to require one judgment to be set off against the other, as he could not have done so without disregarding the equitable rights of persons not parties to these proceedings.

It may be quite true that an attorney has no lien on a judgment recovered by him for his fee (*Scharlock v. Oland*, 1 Rich. 207), and it may also be true, under the case of *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833, that a chose in action arising out of a tort strictly personal is not assignable, though in this case the tort upon which the action was founded was a wrong done to property, and not to the person, as in *Miller v. Newell*, *supra*, yet it is undoubtedly true that an attorney has an equitable claim to be paid for his services out of the judgment which he has recovered for his client; and the court in a proper case, especially in a matter addressed to its discretion, will always recognize such a claim. As is said in the case of *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280, "The right to set off one judgment against another is purely equitable, and only allowed where good conscience requires it; and good conscience is far from requiring that an attorney's claim for services in securing the judgment should yield to the claim of those holding rights adverse to their clients."

It is true that in *Duncan ads. Bloomstock*, 2 McCord, 818, 13 Am. Dec. 728, the court did order one judgment set off against the other, notwithstanding an assignment of one of them to a third person; but that decision manifestly proceeded upon the ground that the assignment was not made in good faith, but simply for the purpose of defeating the motion to set off one judgment against the other; for the court used this language: "The court will nevertheless respect such an assignment, where it appears calculated to promote the ends of justice, but not where it has a contrary tendency." The circuit judge evidently supposed that by respecting the assignment in this case the ends of justice would be promoted, and we agree with him. It appears to have been made in pursuance of an agreement entered into at the time the action was commenced, and was doubtless the means, and possibly the only

means, by which the plaintiff obtained the services of an attorney, which have proved effective.

The counsel for respondent, in his argument, has raised a question as to the validity of the confession of judgment before the trial justice, but as that question was not passed upon by the circuit judge, his decision being rested solely on the ground of the assignment, we are not at liberty to consider it.

The judgment of this court is, that the order appealed from be affirmed.

SET-OFF OF MUTUAL JUDGMENTS is discussed in the note to *Duncan v. Bloomstock*, 13 Am. Dec. 729-731. See *Puett v. Beard*, 86 Ind. 172; 44 Am. Rep. 280; *Hovey v. Morrill*, 61 N. H. 9; 60 Am. Rep. 315; *Skrine v. Simmons*, 36 Ga. 402; 91 Am. Dec. 771; *Thorp v. Wegesarth*, 56 Pa. St. 82; 93 Am. Dec. 789; *Lee v. Lee*, 31 Ga. 26; 76 Am. Dec. 681; *Gunn v. Todd*, 21 Mo. 303; 64 Am. Dec. 231; *Ramsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 301; *People v. N. Y. Common Pleas*, 13 Wend. 649; 28 Am. Dec. 495.

In an action to set off judgments founded upon contract, and obtained by plaintiff and defendant against each other, defendant, claiming his judgment as exempt under the Indiana statute, may defeat the set-off by showing that all his property, including the judgment, is less than six hundred dollars: *Carpenter v. Cool*, 115 Ind. 134.

BROWN v. THOMSON.

[31 SOUTH CAROLINA, 494.]

AGENCY. — THE HUSBAND OF A MARRIED WOMAN MAY BE BY HER CONSTITUTED her agent for the management of her separate estate, and if he, being such agent, purchases articles for her or for her separate estate, or supplies for her tenants thereon, she is liable therefor.

WHETHER A HUSBAND HAS BEEN BY HIS WIFE CONSTITUTED HER AGENT TO MANAGE HER SEPARATE ESTATE, and whether purchases made by him were for the purposes specified, are questions of fact for the jury, and must be left to their decision.

ESTOPPEL. — MARRIED WOMAN WHO REPRESENTS TO A CREDITOR THAT ARTICLES PURCHASED or money borrowed are for the use of her separate estate will be afterwards estopped from disputing that representation, unless it appears that the creditor knew at the time he extended credit that such representation was not true.

BURDEN OF PROOF. — MARRIED WOMEN. — When it is shown that a married woman has represented, as a matter of fact, that a contract was made in reference to her separate estate, then the burden of proof shifts, and it is incumbent on her to show such facts as defeat the estoppel arising from her representation, and this she can do only by proving that the creditor knew at the time he extended credit that the articles were not purchased for that purpose.

STOPPEL. — MARRIED WOMAN who writes to a merchant, stating that she owns property of value, which she specifies, on which a promising crop is growing, that she proposes to settle every dollar due him, and that she would charge the tenants the same as she was charged, and requesting a further credit, is estopped from proving that articles subsequently furnished her by the creditor were not for her separate estate, unless she can proceed further, and show that the creditor knew that they were not for such estate.

ACTION by the administrators of J. J. Brown against Jessie M. Thomson. The letter from Mrs. Thomson to Brown, referred to in the opinion of the court, is as follows: —

“**MAJOR BROWN,** — Some time since, I received your note, and have not felt able to answer till now. I want to say, Major, in confidence, and not boasting, but as a matter of business, that I own property in York County to the value of thirty thousand dollars, and there is not a lawyer there who will not tell you that my name stands high, financially; and moreover, the most moderate judges place our growing cotton crop at 150 bales as a low figure, and as certain of that, with no natural disaster. Mr. Richard Thomson, who is always moderate and safe in his estimates, places our crop as above, while many go over this. I state this to show our ability to meet our obligations, and I now wish to say that I propose to settle fairly, and to your satisfaction, every dollar due you, and to make the proper difference between cash and time prices, on account of our disappointment in not paying you, caused by our not getting money firmly promised.

“**Mr. Thomson** says we ought to pay the time price, and when we settle, you will be perfectly satisfied, as we will charge our tenants the same you charge us, and it will not be our paying it really.

“**We have** traded with you, and got along so friendly, and you can rest perfectly assured that our settlement this fall will be prompt and satisfactory. We prefer trading with you as we stated, although we shall want but little. One of our tenants is here now, and wants fifty pounds of bacon, which I should like to get from you. Please state what you will charge for this, payable November 1st. Hoping that what I have written will prove satisfactory, I remain,

“**Very respectfully,**

“**July 12, 1884.**

MRS. J. M. THOMSON.”

The following instructions were given the jury: —

“*Gentlemen of the Jury,* — The legal propositions which I shall submit to you are contained in requests to charge, first,

on the part of the plaintiff, and also on the part of the defendant, with slight modifications to both sets of requests.

"I charge you, in this case, that if the defendant's husband, W. W. Thomson, had the management and control of her farm as agent, and she recognized his orders to and purchases from J. J. Brown, that she is liable for all articles purchased by him for use on the farm, and supplies for her tenants. After the writing of that letter, which is put in evidence, signed by the defendant, and said to bear date, or at least to have been written on, July 12, 1884, the burden is on the defendant of showing that the articles purchased were not for use on her farm or for her tenants. The defendant is estopped by that letter from denying that the goods purchased after the writing of that letter were for use on her plantation, or for her tenants, unless it be shown that J. J. Brown knew that such goods were intended for other purposes. Defendant is liable for all articles purchased by her of the plaintiff's intestate, Mr. Brown, except those for use of herself and family.

"Now the defendant's requests. Even if defendant was fully capable of contracting, the books of account would not be evidence as to articles which are itemized in the account. Charges on the books for cash loaned or advanced, or simply for amount or amount of order, are not of themselves sufficient proof of indebtedness, even against a person fully capable of contracting. But if they are sustained by the orders, or by other evidence in the case, of course they would be sufficiently established. Before a married woman can be held liable in an action of this kind, two things must concur: She must authorize or ratify the contracts; the contract must have reference to her separate estate. A promise of a married woman to pay for articles bought and used as household supplies cannot be enforced in an action such as is brought here. I would rather say,—cannot be enforced in this action; the supreme court having adjudged that question in this very case. The defendant in this action cannot be bound for the provisions and clothing of herself, her husband, and their children; and under the decision of the supreme court in this case, to bind a married woman in an action of this kind, the contract must be shown to have reference to her separate estate. The credit must have been extended to her alone, and the contract for her own purposes. The burden of the proof as to all the facts necessary to be established in action on the alleged contract of a married woman is generally upon the plaintiff;

and if the proof is equally balanced, the verdict must be for the defendant. But after a representation to the creditor that the contract is made with reference to her separate estate and for her benefit, then the burden would be shifted, and the defendant must show that the articles got were not, as represented, for the benefit of her separate estate.

"You will take the record, gentlemen, and find a verdict for any balance which, according to these legal principles, there may be found due by the defendants, taking off the payments which have been proved in the case, and throwing out of the account those items which are not sufficiently proved, and to which, according to the law as I have laid it down, the defendants may be found not entitled. Find a verdict for whatever balance you may find, after allowing those deductions, if any."

Thomson, Nicholls, and Moore, for the appellant.

R. K. Carson, for the respondent.

McIVER, J. This is the second appeal in this case, and for a more full statement of the facts than it is deemed necessary to make here, reference should be had to the case as reported in 27 S. C. 500. It is sufficient to say, that the action was to recover the amount of an account for goods, wares, and merchandise, alleged to have been sold and delivered by plaintiff's intestate to the defendant, who was, and is, a married woman, during the year 1884. Under the former appeal, this court held that while the defendant, though a married woman, would be liable for such articles as were purchased by her, or by her authority, for the use of her separate estate, — her plantation, — yet she would not be liable for household supplies furnished her for the use of herself and family, under such a proceeding as this, though plainly indicating that, under proper allegations and proper proofs, the income of the defendant's separate estate might be subjected to the payment of such portion of the account as should appear to have been contracted for the use of herself and family. The case was therefore sent back for a new trial, in order that the jury might pass upon the question as to how much of the account sued on the defendant should be held responsible for under the principles above stated.

The case having come on for a new trial before his honor Judge Kershaw and a jury, a verdict was rendered for very nearly, though not quite, the whole amount of the account;

nicht v. Rawls, 24 S. C. 461; 53 Am. Rep. 268), yet, after it had been shown that the married woman had represented, as matter of fact, that the contract was made with reference to her separate estate, then the burden of proof shifts, and it is incumbent upon her to show such facts as would defeat the estoppel arising from such representation, — not simply that “the articles got were not, as represented, for the benefit of her separate estate,” as stated by the circuit judge, more favorably to defendant than she had a right to ask; for when the jury have reached the conclusion that the articles were purchased upon her representation that they were for the use of her separate estate, that concludes any further inquiry, except that the creditor knew, at the time he extended credit, that the articles were not purchased for that purpose, and the burden of showing this is upon the married woman. We do not see, therefore, how either the second or third ground of appeal can be sustained.

As to the fourth ground of appeal, it is sufficient for us to say that we think it rests upon a misconception of the judge's charge, and cannot therefore be sustained. In that portion of the charge to which this exception seems to point, the circuit judge was simply drawing the attention of the jury, as directed by the former decision, to the distinction between articles purchased for the use of defendant's plantation and of the tenants thereon, and articles purchased for her own use, or of members of her family; and no such error as that which it is sought by this exception to impute to that portion of the charge can be discovered.

It only remains to consider the fifth and sixth grounds of appeal, in which it is claimed that the circuit judge erred in refusing the motion for a new trial, or at least in not granting a new trial *nisi*. This depends so entirely upon questions of fact, over which we have no jurisdiction, that it is scarcely necessary to say more upon the subject. Whether the plaintiffs were entitled to a verdict for the whole amount of the account sued on, or only a portion thereof, depended upon the view which the jury might take of the evidence; and whether they erred in the view which they took is not a matter which we can consider. The questions of fact arising in the case were submitted to the jury, under instructions as to the law, of which, as we have seen, the defendant has no legal right to complain, and their finding is conclusive.

It is a mistake to suppose or assume, as is done in the argument submitted by counsel for appellant, that the jury disre-

garded the instructions of the circuit judge, and therefore that he was bound to grant a new trial. This was not a case in which the circuit judge had the power to direct, as matter of law, that the verdict should be either one way or the other, for the very obvious reason, that it depended upon what view the jury might take of the evidence. See what is said upon this subject in the very recent case of *McCord v. Blackwell*, 31 S. C. 138.

In the argument here, counsel for appellant have taken the position that "the farm was owned jointly by defendant and her children, and articles for their joint use and benefit cannot be made a charge against the defendant in this action"; but so far as we can discover, no such point was raised in or passed upon by the circuit court, nor is it raised by any exception. There is no finding of fact upon which to base such a position, nor is there any ruling in regard to it which we can review. We have therefore not felt at liberty to consider it.

The judgment of this court is, that the judgment of the circuit court be affirmed.

IN THE CASE of *Gwynn v. Gwynn*, 31 S. C. 482, the decision of the principal case was followed; but as it appeared that the creditor was not misled by any representation made by the married woman, it was held that she was not estopped by a declaration contained in a note made by her that such note was made with reference to her separate estate, and intended to be a charge upon the same; and that she was therefore, notwithstanding such declaration, at liberty to prove, if she could, that the moneys for which such note was given were not for her separate estate, and that the lender knew this at the time the money was loaned and the note taken. In *Howard v. Kitchens*, 31 S. C. 490, it was decided that where a married woman borrows money for her own use, and not for another, it is not a purchase of property, but is a contract as to her separate property, and enforceable against her separate estate, but that so much of a note of a married woman as is based upon her promise to pay for necessary expenses of her daughter, for which, by law, her husband is liable, is not a contract as to the separate property of the wife, and therefore is not binding upon her. In *Schmidt v. Dean*, 31 S. C. 498, the same court determined that if a married woman borrows money upon the representation that it is for herself, and the lender knows nothing to the contrary, she is answerable for this debt. In *Law v. Lipscomb*, 31 S. C. 504, the same court held that if a married woman, in person, secured a loan of money, which was placed in her hands, and for which she executed her note and mortgage, and afterwards turned this money over to her husband, as her agent, who, in turn, secured her therefor by a mortgage on his property, that her note and mortgage constituted a binding contract, enforceable against her separate estate. The rules established by the principal case have been very frequently reaffirmed in the recent decisions in South Carolina. *Building and Loan Ass'n v. Jones*, 32 S. C. 308, determines that if a married woman, acting by her husband as her agent, applies for and procures a loan of money, it becomes her separate estate, and she is answerable on her bond given for its repayment, unless the lender knew

when making the loan that it was not for her use, and the fact that she permitted her husband to use part of the money does not tend to show that the lender knew that any part of the loan was not for her benefit. A married woman, borrowing money on her note and mortgage, representing that it was wanted to pay off a pre-existing mortgage on her property, the consideration of which was unknown to the lender, is estopped from denying that the loan was made in reference to her separate estate: *Wallace v. Carter*, 32 S. C. 314. Similar in effect is *Chambers v. Bookman*, 32 S. C. 455. But if the lender has notice that moneys are borrowed to purchase family supplies, and to pay off a mortgage which could not be enforced against the separate estate of a wife, he cannot enforce a note and mortgage given by her to secure the repayment of his loan: *Goodgion v. Vaughn*, 32 S. C. 499.

ESTOPPEL — MARRIED WOMEN. — The doctrine of estoppel applies to married women: *McDanell v. Landrum*, 37 Ky. 404; 12 Am. St. Rep. 500, and particularly note 503, 504.

GARVIN v. GARVIN.

[31 SOUTH CAROLINA, 581.]

STATUTE OF LIMITATIONS AGAINST SHERIFF'S DEED. — If a judgment debtor sells land which is then subject to a judgment lien, and his vendee enters into possession thereof, and holds the same, claiming title thereto, and a sale is subsequently made, and a sheriff's deed executed, in the enforcement of such judgment, the statute of limitations commences to run in favor of the purchaser from the judgment debtor at the date of his entry into possession, and not from the date of the execution of the sheriff's deed. And if the time between such entry into possession and the commencement of the action is greater than that allowed by the statute of limitations for the bringing of actions to recover real property adversely held, then the plea of the statute of limitations must be sustained, and the right of the purchaser at the sheriff's sale to recover the property denied.

Izlar and Glaze, for the appellant.

Henderson Brothers, and Croft and Dunlap, contra.

MCGOWAN, J. This action was brought to recover a tract of land of nine hundred acres, known in the proceedings as the mill tract. The case is another phase of a controversy which has been several times in this court, and in order to make it intelligible, it will be necessary to give a short statement of the facts out of which it arises. The land lies in Aiken County, and was once the property of Robert Garvin, who lived there. He is the brother of the plaintiff, John, and the father of the defendant, R. C. Garvin, and under him they both claim,—the plaintiff by a deed from the sheriff, who sold the land under an execution of his own as the property of Robert Garvin, January 7, 1878, and the defendant, under a

deed direct from the judgment debtor (Robert) prior to the aforesaid sheriff's sale, viz., on April 15, 1874.

It seems that there was an old judgment, *John Fox v. Robert Garvin, John Garvin, et al.*, lodged in Lexington County (1868). Upon this judgment John Garvin claimed to have paid, as surety for his brother Robert, the principal, the sum of \$1,836.40, and to that extent to be the owner of the judgment under the provision as to subrogation in section 2180 of the General Statutes. John procured an assignment of the judgment to himself in 1872, and afterwards, on August 5, 1875, had a "transcript" of it entered in the clerk's office of Aiken County, where Robert lived, and had it levied on the lands of Robert, including the mill tract in dispute, which, as stated, had been previously conveyed to the defendant. Thereupon Robert instituted proceedings against John, contesting the validity by subrogation of the aforesaid judgment, and Judge Maher granted a temporary injunction against the sale of Robert's lands (May, 1876). Upon the trial of that case, Judge Reed rendered a decree in favor of John for the \$1,836.40, claimed to have been paid by him as surety; and another judgment for that identical amount was entered in Aiken County. This judgment conformed to the record in which it was rendered, and was entitled *Robert Garvin v. John Garvin* (September 16, 1877). Under this last judgment, the property of Robert was levied and sold (including the mill tract then in possession of the defendant), and bid off by John, the judgment creditor, who took sheriff's titles for the same on January 7, 1878.

Long litigation ensued between the brothers, John and Robert, as to the legality of the judgment and execution under which Robert's lands were sold; but we need not go into that now, except to say that the controversy was finally ended by the court sustaining the validity of the judgment: See 14 S. C. 630, 21 S. C. 84, 91, and 27 S. C. 478. Then John Garvin, as purchaser, brought suit for the different tracts of land which he had bid off at the sheriff's sales under his own judgment, and finding the defendant, R. C. Garvin, in possession of a part of the mill tract, he brought this action against him to recover the land, on February 15, 1885, ten years, ten months, and one day after the defendant in execution (Robert) had conveyed the land to him. The defendant denied the plaintiff's right to recover, and interposed,—1. A general denial; 2. Adverse possession for more than ten years, and the statute of

limitations; 3. "That he entered into possession of five hundred acres of the mill tract, under an agreement with Robert Garvin, the owner of the mill tract, to purchase the said five hundred acres; that, having fully complied with the terms of the contract to purchase, the said Robert Garvin executed to the defendant a deed of conveyance in fee-simple to said five hundred acres; that there was a continued occupation and possession of said five hundred acres by the defendant under claim of title in fee for ten years last before the commencement of this action, and denying each and every allegation of the complaint not in the third defense specifically admitted," etc. The case has been in this court before. Upon the first trial, the circuit judge held that the (old) Fox judgment was merged in the subsequent one for the same money of *Garvin v. Garvin*, entered under Judge Reed's decree in Aiken County, September, 1877, and therefore the plaintiff had no lien upon the property of the defendant in execution (Robert) prior to that time, and consequently there was a verdict "for the defendant" for the land which had been previously conveyed to him. But, upon appeal, that ruling was reversed as error, and a new trial was granted on that ground alone: See *Garvin v. Garvin*, 27 S. C. 474.

The new trial ordered was had before Judge Aldrich and a jury. It being then adjudged that the old Fox judgment was not merged in that of *Garvin v. Garvin*, entered under Judge Reed's decree, but that the plaintiff was entitled also to the lien of the older judgment, the principal question then considered was in reference to the statute of limitations and as to the effect of the adverse possession of the defendant as against John Garvin, the plaintiff. Both parties submitted requests to charge, some of which the judge charged, and others he charged in modified form. The jury found "for the plaintiff the land in dispute," and the defendant appeals to this court on various exceptions, which are all printed in the brief. They complain of error in several particulars, in respect to certain alleged acknowledgments of title, the admission of certain incompetent evidence, that the judge charged the jury upon the facts, etc. But, from the view which the court takes, it will not be necessary to consider any of the exceptions other than those which allege error in the principles announced as to the effect of the defendant's adverse possession under the conveyances to him, and the statute of limitations. As the rulings upon that subject may

affect somewhat the other questions, we think it safer and better for both parties not to consider them now.

"Exception 4. Because the circuit judge erred in charging the jury, as requested by the plaintiff, as follows: —

"That when, on January 7, 1878, the sheriff sold the land in dispute as the property of Robert Garvin, the lien of the Fox judgment on said land was valid and binding, and that the deed of the sheriff conveying said land to John Garvin gave him a title paramount and superior to that of the defendant, R. Garvin, from his father, dated April 15, 1874';

"That the legal title to the premises having been established in the plaintiff under his sheriff's deed, he is presumed under the law to have been in possession of the premises within the time required by law, to wit, ten years, unless it shall appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of the action';

"If the legal title of John Garvin, the plaintiff, accrued on January 7, 1878, and this action was brought on February 16, 1885, therefore, as ten years did not exist between the former and the latter date, the plea of adverse possession cannot avail the defendant, and, as a matter of law, the plaintiff must have a verdict."

"Exception 7. Because the circuit judge erred in charging the jury as follows: 'The defendant's title is dated April 15, 1874, and the suit was commenced on February 16, 1885, less than ten years after the date of his title,' etc.

It was undoubtedly adjudged upon the former appeal that the Fox judgment was not merged in that of *Garvin v. Garvin*, subsequently recovered, and that the plaintiff was entitled to the benefit of the older lien. Nothing, however, was then ruled (for the point was not made) as to the time when the Fox judgment in Lexington County acquired a lien upon the property of the defendant in execution (Robert) in Aiken County. It seems to have been taken for granted that, as John Garvin was entitled to the lien of the Fox judgment, it had a lien *proprie vigore* upon property of the defendant in Aiken County from its date (1868), or at least from the time it was assigned to John Garvin (1872). It appears that the Fox judgment was in Lexington, and that no "transcript" of it was filed in Aiken County until August 5, 1875, which was after the defendant in execution had conveyed the five hundred acres to the defendant, R. C. Garvin (April 15,

1874). It is quite clear that if that judgment had been entered in Lexington after 1870, it would not have had a lien upon property in Aiken County until it was regularly "transcripted" to that county: See Code, sec. 310.

The Fox judgment, however, was entered at Lexington in 1868, which was before the code; but we are unable to see why the interest of John Garvin in the judgment by subrogation should not, like that of the original plaintiff, Fox, be subject to the act of 1849, which was certainly of force in 1868, and provided as follows: "That from and after the passage of this act, no judgment, nor any execution issued thereon, shall, as against any creditor or creditors of the party against whom such judgment shall have been obtained, by confession or otherwise, or against any purchaser or purchasers, for valuable consideration, have any lien on the property, or any part thereof, of any such party, except in the district (county) where the judgment is first entered and execution lodged, until an execution issued thereon be lodged in the proper office in the district (county) where such party usually resides, at the time when such judgment was obtained; *provided, nevertheless*, that this act shall have no force or effect as to defendants who are non-residents of the state and transient persons," etc.: 11 Stats. 582. It is true that the title of this act appears in the list of "acts, ordinances, and resolves which have expired, or have been or are hereby expressly repealed," etc., contained in the General Statutes of 1872. But in considering the charge of the judge on the face of the papers themselves, and for that purpose assuming that the deed under which the defendant entered was *bona fide*, it seems to us that it is at least worthy of consideration whether the Fox judgment ever acquired a lien upon the land in Aiken County, conveyed by the judgment debtor to the defendant on April 15, 1874.

But passing that, without making any ruling upon the subject, and taking the view of the plaintiff, that the Fox judgment in Lexington had a lien upon the property of the judgment debtor in Aiken County before the conveyance was executed to the defendant, R. C. Garvin, it seems to us that it was not in accordance with the decided cases to hold "that the defendant's title is dated April 15, 1874, and the suit was commenced on February 16, 1885, less than ten years after the date of his title. . . . He (defendant) claims that he has been in adverse possession more than ten years, and that he has acquired what the books call the statutory title, — a title

under the statutes. Well, now, the adverse possession must be against the party who has the right of action. John Garvin did not have the right of action until he got title from the sheriff under the Fox judgment, which bears date January 7, 1878. You see, by calculation, from April 15, 1874, to January 7, 1878, does not make the period of ten years," etc. The deed to the defendant bears date April 15, 1874, and the action was brought February 16, 1885, which was not "less than ten years after the date of his title," as reported to have been charged by the judge. We do not, however, lay any great stress on that, but assume that it was a mistake in the printing, or some other way, for the most cursory inspection of the papers shows that the period in question was ten years, ten months, and one day.

We rather suppose that the judge intended to say what he had before stated, viz., that the possession of the defendant as grantee of the debtor could not be adverse as against John Garvin, while he (John) was only a judgment creditor, with a lien on the property of the grantor, Robert; but that such possession only became adverse to John when he purchased the land at sheriff's sale (January 7, 1878); and from that time until the action was commenced "was less than ten years." Thus understood, was the charge error? It is not to be denied that there has been some confusion, or at least want of clearness, in the authorities upon that very point, viz., whether the possession of a grantee from a defendant in execution can be considered as adverse to the lien of the judgment creditor, so as, after the lapse of the statutory period, to bar such judgment creditor. Upon the question, it seems to be considered that there is a wide difference between the possession of a mere naked trespasser and that of a *bona fide* purchaser from the judgment debtor, whose deed carries all his interest to his grantee. In the case at bar, the possession of the defendant was as purchaser under a regular deed from the judgment debtor. The deed bears date April 15, 1874, and for nearly four years thereafter, down to the sale of the sheriff (January 7, 1878), John Garvin had only the lien of his judgment against his debtor, Robert. At that sale, however, he bid off the land sold as the property of Robert, and had sheriff's titles for something over seven additional years, down to February 16, 1885, when the action was commenced. These two periods added together make more than the ten years required by the statute, and the question, therefore, is, whether the possession of the de-

fendant as purchaser for that whole time gives him a statutory title as against John, who for about four years of the time was a judgment creditor of Robert, and for the remainder of the time held sheriff's titles, executed upon a sale of the land as the property of Robert.

In view of the declared policy of the statute of limitations to quiet possessions, it has been held that "one having possession of land may hold the same adversely, and acquire title by such possession for the statutory period, although there was a judgment against the owner when the possession commenced, or one was recovered against him afterwards, and the land was sold by the sheriff before the statutory period was complete": See *Lamar v. Raysor*, 7 Rich. 510; *McRaa v. Smith*, 2 Bay, 339; *Pegues v. Warley*, 14 S. C. 180; 6 Wait's Actions and Defenses, 444. In defense of this doctrine, as applied to the lien of a judgment, but not of a mortgage, we can add nothing to what was so truly said by Judge Withers, in delivering the judgment of the old court of appeals in the case first above cited: "The case of *McRaa v. Smith* established a rule which has never been disavowed, to wit, that one occupying land, using and claiming it as his own, acquires immunity against action, even by the creditor of the judgment debtor, or the purchaser at sheriff's sale under the judgment, after the proper lapse of time. Judge Waties so held, and his judgment was affirmed on appeal. . . . Though strictly it is true that a judgment creditor as such cannot sue a trespasser on the property of his debtor, nor a purchaser under the judgment, until after he has become such, yet it is equally true (as was said in *Cholett v. Hart*, 2 Bay, 156) that the first has only himself to blame by voluntary quiescence, with a full protection at command all the time, and the last can buy from the sheriff no more than existed or remained in the judgment debtor, and is as well concluded by the doctrine of *caveat emptor*, where the judgment debtor has been divested by transaction *in pais*, as where the judgment debtor never had any title to the property sold," etc.

True, it was held in the case of *Pegues v. Warley*, 14 S. C. 180, that the doctrine of *McRaa v. Smith*, 2 Bay, 339, though established, was not to be extended, and that in such case the possessions of successive purchasers could not be united in order to make out the period required by the statute. But in this case there is no question of that kind. There is no need of uniting possessions, for there was but one purchaser, the defendant, who

claims to have held adversely for more than the whole statutory period. In this respect the case is precisely like that of *McRaa v. Smith*, in which there was one continuous possession in the defendant, Smith, for the whole period necessary; and it follows that the ruling must be the same as it was in that case. Of course it is not intended to conclude anything as to the *bona fides* of the deed to the defendant R. C. Garvin, or as to the adverse character of his possession under it: See *McCord v. McCord*, 3 S. C. 577.

The judgment of this court is, that the judgment of the circuit court be reversed and the cause remanded to the circuit court for a new trial, in accordance with the conclusions herein announced.

THE REMARKABLE DOCTRINE OF THE PRINCIPAL CASE, that a purchaser of real property which is subject to a judgment lien is entitled from the moment of taking possession to be regarded as holding adversely to any one who may subsequently acquire title by virtue of a sale to enforce such lien, is supported by the earlier decisions in the same state, but, so far as we can ascertain, has never been promulgated elsewhere. The general rule is, that until one has a cause of action, no statute of limitations can operate against him, for it is of the essence of prescription that some person should have suffered an infringement of his rights and delayed seeking redress therefor. The sale by a judgment debtor of his real property infringes no right of the judgment creditor. It is only when the latter or some other person has purchased the property at the execution sale, and become entitled to a deed, that the possession of a purchaser from the judgment debtor becomes a proper subject of complaint. Not until the right to such deed is perfect, and perhaps not until it is executed and divests the legal title which was subject to the judgment lien, can the statute of limitations properly be treated as operative to initiate a title by prescription: Freeman on Executions, sec. 333.

In the case of *Wyatt v. Elam*, 23 Ga. 201, 68 Am. Dec. 518, the facts were these: The land in question was sold under execution as the property of a father, to whose two minor sons the purchaser at the execution sale conveyed it; the father and his two sons thereupon took and held joint possession under the conveyance of the sons, and subsequently the land was again sold under execution as the father's; the purchaser at the second execution sale, after more than seven years after the commencement of such joint possession, brought an action against the father and sons for the land. The court held that under the circumstances of the case the possession of the two sons was adverse to such purchaser.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

WOLVERTON v. DAVIS.

[35 VIRGINIA, 64.]

STATUTE OF FRAUDS. — PROMISE BY A STRANGER TO A DEBT TO INDEMNIFY A SURETY is *prima facie* within the statute of frauds, because it is in effect a promise to answer for the default of the principal debtor.

STATUTE OF FRAUDS. — PROMISE OF ONE SURETY TO INDEMNIFY ANOTHER, if he will become co-surety with him on an official bond, falls within that provision of the statute of frauds which requires that a promise to answer for the default or the misdoing of another must be in writing to be enforceable by an action. Therefore, if the surety to whom the promise was made is compelled to pay the whole debt, he cannot recover of his co-surety who made the promise anything beyond his aliquot share of the loss occasioned by the default of the principal.

Hunton and Son, for the plaintiff in error.

William H. Payne, for the defendant in error.

HINTON, J. The question to which the arguments of counsel on both sides of this case were chiefly directed, and upon the solution of which our decision must depend, is whether a promise by one to indemnify another, who has become co-surety with him in an official bond, at the promisor's request, falls within that provision of our statute of frauds which requires that "a promise to answer for a debt, default, or misdoings of another" must be in writing to be enforceable by action: Code Va., 1873, c. 140, sec. 1. The question arises in this way: In 1858, one Thomas K. Davis, being elected sheriff of Prince William County, executed, as he was required by law to do, a bond to the commonwealth of Virginia, in the penalty of seventy thousand dollars, for the faithful discharge

of his duties, with William W. Davis, Samuel Wolverton, and nine others as his sureties. By reason of this suretyship, Wolverton was compelled to pay off a judgment, amounting in January, 1882, the time at which it was discharged, to the sum of \$1,179.13. Thereupon Wolverton instituted this action to recover of his co-surety, William W. Davis, the full amount so paid. In his amended declaration he sets out the foregoing facts, alleges the insolvency of Thomas K. Davis, and avers that he became a surety in the bond at the request and upon the promise of the said William W. Davis that he would indemnify him against any loss resulting from his suretyship. In the progress of the trial, the plaintiff, Wolverton, offered to introduce witnesses to prove that prior to the execution of the beforementioned bond, the defendant and Thomas K. Davis agreed orally that the defendant, William W. Davis, should be deputy of Thomas K. Davis; that they would divide the profits of the office between them; and that the said Thomas K. Davis and William W. Davis were each to furnish sureties in the said official bond of Thomas K. Davis as sheriff. And that, in pursuance of said agreement, the defendant requested the plaintiff to become surety in the said bond, and orally promised the plaintiff that if he, the plaintiff, would become one of the sureties on said bond, that he, the defendant, would indemnify him against all loss arising therefrom; and that he was induced to sign the bond by reason of this promise. But the court excluded the evidence, being of opinion that it was not admissible to prove a liability on the defendant for the whole amount, because the promise was not in writing.

It is therefore upon exceptions to this ruling of the circuit court that the case is before us for review; and a more difficult question for judicial decision, if the mere weight of authority be looked at, can scarcely be imagined; for in England, even at this day, and notwithstanding the decision of Vice-Chancellor Malins in *Wildes v. Dudlow*, 23 Week. Rep. 435, the authorities cannot be reconciled, and in America the authorities would seem to be about evenly balanced, there being the decision of "eight states [see 3 South. L. Rev. 444] at one end of the scale to weigh against eight at the other." And see also, on this subject, Throop on Verbal Agreements, 459 et seq., where all the cases are reviewed. It is believed, however, that, no matter what may be the law, where the promisor is also a surety,—a point to be presently discussed,—that the result of the authorities as a whole is as stated by the learned editor

of Smith's Leading Cases, in his notes to *Birkmyr v. Darnell*, vol. 1, p. 326, that a promise by a stranger to the debt to indemnify a surety is *prima facie* within the statute, because the principal is bound by an implied obligation to do that which the promisor agrees to do expressly, and the promise is therefore really to answer for default of the principal: 1 Smith's Lead. Cas., 8th Am. ed., pt. 1, 538; *Green v. Cresswell*, 10 Ad. & E. 453; *Cripps v. Hartnoll*, 31 L. J. Q. B. 150; *Kingsley v. Balcome*, 4 Barb. 131; *Baker v. Dillmann*, 12 Abb. Pr. 313; *Easter v. White*, 12 Ohio St. 219; *Kelsey v. Hibbs*, 13 Ohio St. 340; *Brown v. Adams*, 1 Stew. 51; 18 Am. Dec. 36; *Brush v. Carpenter*, 6 Ind. 78; *Draughan v. Bunting*, 9 Ired. 10; *Simpson v. Nance*, 1 Speer, 4; *Bissig v. Britton*, 59 Mo. 204; 21 Am. Rep. 379. And certainly, upon the reason of the thing, this must be so; for not only does such a case fall within the mischief intended to be remedied by the statute, but it is within the words also. The promise, in substance and effect, is this: If you will become bound as surety for this sheriff, I will save you harmless from the consequences of your suretyship. And to use the vigorous language of Lord Denman in *Green v. Cresswell*, 10 Ad. & E. 453, "if there had been no decisions on the subject, it would appear impossible to make a reasonable doubt that this is answering for the default of another." But it is said by some of the text-writers — and such is the position taken by the defendant in error in this case — that whenever the promisor is a surety also, and therefore answerable for the default of the principal independently of his promise, the law is otherwise; and that any engagement which he may make that it shall be paid, or that the surety shall not be compelled to pay it, must be regarded as contracted on his own behalf, and not for the default of the principal. But we do not think that there is any real foundation for any such distinction, and certainly none such is sanctioned by the leading cases of *Thomas v. Cook*, 8 Barn. & C. 728, and *Green v. Cresswell*, 10 Ad. & E. 453, although in the last-mentioned case it was brought to the attention of the court by counsel, in the course of the argument, that in *Thomas v. Cook* the defendant was liable upon the bond, independently of the promise upon which he was sued. The fact is, that while, in the large majority of the cases where the promisor was also a surety, the promise has been held not to be within the statute, that circumstance does not appear to have been relied upon as the ground of

decision. The true question to be determined in every such case is as announced by the supreme court of Missouri in *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379, where the promise amounts to an original undertaking and is supported by a direct consideration, or is collateral in its character, and depends upon some act to be admitted or performed by some third person: *Draughan v. Bunting*, 9 Ired. 10; 1 Wms. Saund. 211 c. Applying this test to the case in hand, it seems to us clear that the promise of indemnity made by the defendant is within the statute, and not capable of enforcement. It follows that the judgment of the circuit court of Prince William County was right in only holding the defendant, Davis liable for his aliquot share of the loss occasioned by the default of his principal, and that the same must be affirmed.

STATUTE OF FRAUDS. — A promise to answer for the debt, default, or misdoing of another must be evidenced by a writing: *Stewart v. Jerome*, 71 Mich. 301; 15 Am. St. Rep. 252, and note 258, 259; *Clark v. Jones*, 85 Ala. 127.

SOUTH WEST IMPROVEMENT Co. v. SMITH'S ADM'R.

[85 VIRGINIA, 306.]

MASTER AND SERVANT. — ONE WHO IS OPERATING A COAL MINE BY THE AID OF CARS AND OTHER MACHINERY, while he is not an insurer of the safety of his employees, is yet bound to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of the mine, to put and keep it and the instrumentalities there used in a safe and good condition.

MASTER AND SERVANT. — A MINOR no less than an adult servant takes upon himself the ordinary hazards incident to the service in which he is engaged.

PRACTICE. — ON DEMURRER TO EVIDENCE, all evidence offered by the party demurring must be omitted from consideration, and he must be treated as admitting all that the jury might infer from the evidence of his adversary.

RETROSPECTIVE STATUTE. — A RULE OF PRACTICE PRESCRIBED BY STATUTE for an appellate court applies to all cases pending in that court, though they were determined by the trial court before the statute was enacted.

MASTER AND SERVANT. — MASTER WHO UNDERTAKES TO RUN DANGEROUS MACHINERY WITH INSUFFICIENT HELP, in consequence of which a servant is injured, is guilty of negligence, and is answerable to the servant so injured.

MASTER AND SERVANT. — A MASTER MAY BE HELD ANSWERABLE FOR INJURIES SUFFERED BY A SERVANT through the neglect of the master to supply with sufficient brakes a train of cars which was being operated in a coal mine, in which the servant was employed, or from the operating

of such cars in the absence of insufficient help, whereby there was a failure to properly sprag or chock them.

CONTRIBUTORY NEGLIGENCE WHILE ACTING IN A PERILOUS POSITION. — If one, through the negligence of another, is placed in a situation of peril, where he must adopt a perilous alternative, or where, in the terror of an emergency for which he was not responsible, he acts wildly or negligently, contributory negligence will not be imputed to him, because persons in great peril are not required to exercise the same presence of mind and carefulness which would be exacted of them in ordinary circumstances.

John H. Fulton, for the plaintiff in error.

Henry and Graham, for the defendant in error.

LEWIS, P. The first question is, whether the declaration is defective. It alleges, in the first count, that at the time the accident in question occurred, the defendant company was the owner of certain coal mines in Tazewell County, which it was engaged in operating, and that William H. Smith, the plaintiff's intestate, an infant of thirteen years and eleven months of age, was an employee of the company; that it was the duty of the company "to use due and proper care for the safety of the said William H. Smith while he was so employed and working in said coal mines, and to the extent of its ability, by due and proper skill and care, to so provide in operating said coal mines as that the said William H. Smith could safely work therein while in the service of the defendant, and also, to the extent of its ability, by due and proper care, foresight, prudence, and caution, to select competent agents to manage, control, and operate said coal mines, and to manage and control the machinery and cars which were used in and about said coal mines," etc.

The second and last count alleges that it was the duty of the defendant "to keep the said coal mines, and the machinery therein, and its cars used for conveying coal in and about said coal mines, in as good order, safe condition, and under as good control as human care, foresight, and prudence could reasonably provide, and also to use due and proper care and caution in selecting careful and competent agents to operate said coal mines, and to run, manage, and control said machinery and the said cars, and to see that the cars were under good and safe control, so far as could be reasonably provided." But that the defendant "did not use such care and caution as aforesaid, and as was required of it, but, on the contrary thereof, was altogether careless and negligent in this, to wit: That by

and through its servants and agents it negligently permitted its cars, used in and about its coal mines as aforesaid, to strike and run over the said William H. Smith, whereby he was instantly killed, while in the service of the defendant and at his post of duty."

There was a demurrer to the declaration and to each count thereof, but the demurrer was overruled; and this ruling of the circuit court is assigned as error. It is contended that the demurrer ought to have been sustained, because the declaration alleges that the defendant was bound to use a degree of care higher than the law requires.

It is not disputed that the defendant was bound to use ordinary care; that is to say, such care as reasonable and prudent men use, under like circumstances, in selecting competent servants, and in supplying and maintaining suitable and safe appliances for the work to be performed, and in providing generally for the safety of the servant in the course of the employment, regard being had to the character of the work and to the difficulties and dangers attending it; for what would be ordinary care in one case may be gross negligence in another: *Darracott v. Chesapeake etc. R. R. Co.*, 88 Va. 288; 5 Am. St. Rep. 266, and cases cited.

It is contended that the declaration in the present case goes beyond this, and alleges that the defendant, to the extent of its ability, and as far as human care, foresight, and prudence could provide, was bound to care for the safety of its employees, and that it is liable in this action for failing to exercise such care. We do not think that, upon a fair construction of the language used, the declaration is open to this objection. The language in the declaration upon which the objection is based must be read in the light of the qualifying words which immediately accompany it; and thus construed, the declaration is unobjectionable, though it is quite true it might have been better expressed. Thus in the first count, wherein it is alleged that the defendant was bound, to the extent of its ability, to provide for the safety of the plaintiff's intestate, the allegation is qualified by the words "due and proper care," etc., so as to read, in substance, that it was the duty of the defendant, to the extent of its ability, by the use of due and proper care, to provide for the safety of its servants in the course of the employment; thus, in effect, charging no higher degree of care than the law requires.

And so in the second count, the allegation is, not that the

defendant is bound absolutely to keep its cars in as safe condition and under as good control as human care and foresight can possibly provide, but under as good control as human care and foresight can reasonably provide, just as in the concluding part of the count it is alleged that it was the duty of the defendant "to see that the cars were under good and safe control, so far as could be reasonably provided."

This being so, it would be an illiberal and too strict a construction to hold that the declaration charges that the defendant was bound to use more than reasonable care; and reasonable care, which is nothing more or less than ordinary care, is required of the employer: *Cooley on Torts*, 557; *Clark's Adm'r v. Richmond & D. R. R. Co.*, 78 Va. 709; 49 Am. Rep. 394; *Wabash R'y Co. v. McDaniels*, 107 U. S. 454, 460. In 2 *Thompson on Negligence*, 986, 987, a case is cited from the supreme court of Illinois, in which it was held that while railroad companies are not insurers of the safety of their employees, or that their road, appurtenances, and instrumentalities are safe and in good condition, yet they are bound to do all that human care, vigilance, and foresight can reasonably do, consistent with the modes of conveyance and the practical operation of the road, to put them in that condition, and to keep them so. And the principle equally applies to the present case.

No question is raised in this connection as to the infancy of the plaintiff's intestate, and very properly, because a minor, no less than an adult, takes upon himself the ordinary hazards incident to the service in which he engages, and whether an infant employee who is injured in the service has sufficient understanding to fully appreciate the nature and extent of those hazards, or whether the master has neglected to take due precaution to inform him of them, are questions of fact for the jury, and as to which there need be no averment in the declaration: 2 *Thompson on Negligence*, 977; *Cooley on Torts*, 553; *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, 28.

The circuit court, therefore, did not err in overruling the demurrer to the declaration; and the next and only other question is, whether there was error in overruling the defendant's motion to set aside the verdict, on the ground that the verdict is not supported by the evidence. It is contended that the motion ought to have been granted,—1. Because the evidence fails to establish negligence on the part of the company; and 2. Because it discloses such contributory negli-

gence on the part of the plaintiff's intestate as to defeat a recovery.

The bill of exceptions embodies a certificate, which is partly a certificate of facts and partly a certificate of evidence. It appears, from the certificate of facts, that, at the time he was killed, the plaintiff's intestate was employed by the defendant company as a door-boy, whose duty it was to attend and to open and close, when required, certain doors in the coal mines which were being operated by the defendant. There is what is called an entrance to the mines, which extends northward some distance into the mines, along which a track with rails is laid, over which the coal is conveyed from the mines in cars of about two tons capacity each. A number of chambers open upon this entrance, from which the loaded cars are drawn by mules to the main track on the entrance. As each car is brought out, it is put upon the main track and there stopped. The mules are then unhitched, and the car turned over to an employee, called a spragger, whose duty it is to apply the brakes and to sprag it; that is, as an additional precaution to keep the car stationary, to put a block of wood in front of the wheels, or, as it is also called, to chock it.

The chambers above mentioned are numbered successively from one to eleven, and to bring the coal from these chambers two mule-drivers are employed, and the custom has been to employ as many spraggers. From chamber No. 11 to the door near the mouth of the mine, called the intake door, the track is on a down grade. It is the custom, commencing with chamber No. 1, to bring the coal from the chambers in the order of succession, and when a sufficient number of cars (usually twenty-five) have been brought out and stationed on the track, it is the duty of the train-runner to couple them, and then to take the train down the track and out of the mines, — the train, when the brakes are taken off, moving of its own momentum.

The duty of the plaintiff's intestate was to keep closed, until he was ordered to open, four doors in the entrance, namely, a door at the mouth of each of the chambers, designated, respectively, as Nos. 1, 2, and 3, and also the door across the entrance, or the intake door. These doors are essential to the proper ventilation and safety of the mines, and are designed, as occasion requires, to admit or exclude the air, which is driven into the mines through the entrances and chambers by means of a large fan run by an engine. They are hung

upon hinges, and, at the time the accident complained of occurred, were in good working order. Between the track along the entrance and the west wall of the entrance there is only a space of five feet, and in this narrow space, at the intake door, and inside of and behind the door, the plaintiff's intestate, a boy of thirteen years and eleven months old, was stationed. From this point he went to any of the other three doors above mentioned when his duty called him there, and returned after his duty was performed. It was necessary for him, in order to open the doors, to cross the track; so that his position was one not only of responsibility, but of danger. Inside the mines, lights, of course, are required, to enable persons to see at all, and hence each worker in the mines carries a light fastened into his cap.

When a train has been made up and is ready to move out of the mines, it is the duty of the train-runner to mount the forward car with a light on his cap, slacken the brakes, and notify the switchman of his readiness to move, who in turn signals the door-keeper to open the door across the entrance, so as to allow the train to pass through and out of the mines.

At the time the accident occurred, only one spragger was on duty. The other was absent, and the superintendent in charge had been notified of his absence; but his place was not supplied until in the afternoon of that day, and some time after the accident had happened. On the morning of the same day, there were brought from chambers 5, 6, 7, and 8, seven loaded cars of coal, which in their order were put upon the main track, spragged, and left standing there. Soon afterwards, the eighth car was brought out and put upon the track, which moved down upon the stationary cars in front of it with such force as to set them in motion; the result of which was that the whole train was suddenly and rapidly sent down the grade, breaking through the intake door, and passing over and instantly killing the plaintiff's intestate, whose mangled body was found under the second car, at or near the door where the train stopped.

These are the principal facts proved in the case. In addition to this, however, there is a certificate of evidence, some of which was introduced by the plaintiff and some by the defendant, and as to which we will consider the case as on a demurrer to the evidence by the defendant, the plaintiff in error here; that is to say, the latter must be considered as admitting all that the jury could reasonably infer from the

plaintiff's evidence, and as waiving all its own evidence which contradicts the plaintiff's evidence, or the credit of which is impeached, and all inferences from its own evidence which do not necessarily flow from it: *Trout v. Virginia etc. R. R. Co.*, 23 Gratt. 619; *Richmond etc. R. R. Co. v. Moore's Adm'r*, 78 Va. 93.

This is the rule of decision in the appellate court prescribed by section 3484 of the new code, and which is applicable to the present case, although the judgment of the lower court was rendered before the code took effect; for the statute, when so construed, takes away no vested right, but simply prescribes a rule of decision or of practice in the appellate court which it was competent for the court, independently of the statute, to have adopted, to operate retrospectively as well as prospectively, and thereby to have changed the rule which it (not the legislature) had previously adopted in such cases, which required all the parol evidence of the exceptor to be rejected when the evidence was certified. No point, however, as to the propriety of applying the statutory rule to the present case is made by the defendant in error, and we will not stop, therefore, to further discuss it: *Sedgwick on Statutory and Constitutional Law*, 163, note.

Indeed, upon the evidence in the record, the application of the new rule is not less favorable to the defendant in error than that which has heretofore prevailed, since, upon a most important point in the case, the evidence of the exceptor is extremely favorable for the former. Thus Peter Curry, the spragger, who was examined as a witness for the defendant company, and whose duty it was to sprag the cars as they were brought from the chambers, testifies that while the brakes on the eighth car, above mentioned, which collided with the train and started it, were good, "some of those on the other cars were not good,"—thus establishing negligence on the part of the company, whose duty it was to supply and maintain suitable and safe machinery for its work, and showing, moreover, a state of things from which the jury might have very reasonably inferred that the negligence of the company was the proximate cause of the injury complained of; that is to say, that the starting of the train was caused by the defective brakes on the stationary cars which were set in motion by the concussion produced by the eighth car, and not alone by the negligence of a fellow-servant, for which the company would not be liable: *Hough v. Texas etc. R. R. Co.*,

100 U. S. 213; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642; *Moon v. Richmond etc. R. R. Co.*, 78 Va. 745; 49 Am. Rep. 401; *Richmond etc. R. R. Co. v. Norment*, 84 Va. 167; 10 Am. St. Rep. 827; Wharton on Negligence, sec. 211.

The jury might also have reasonably inferred, from the facts and evidence in the record, that the casualty was caused by the absence of a spragger, it being proved that it was customary, and therefore presumably necessary, to employ not less than two spraggers, and one was absent when the deceased was killed. In *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 Am. St. Rep. 92, Judge Richardson, in delivering the opinion of the court, remarked that the general rule, which exempts the master from liability to his servants for injuries received by them in the course of the employment, does not apply where he undertakes to run dangerous machinery with insufficient help, in consequence of which the servant is injured. Such conduct on the part of the master, he said, is negligence, and constitutes a recognized exception to the general rule; citing *Pierce on Railroads*, 372, note; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Booth v. B. & A. R. R. Co.*, 78 N. Y. 38; 29 Am. Rep. 97; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Rep. 720.

The jury were also warranted in finding that the defense, resting upon the alleged contributory negligence of the deceased, was not sustained. There was evidence for the plaintiff tending to show that the deceased was attentive to his duties, "never had to be told a thing a second time," and was "always at his post," though one of the plaintiff's witnesses testified that he had frequently seen him away from his door when he ought to have been there. For the company, there was evidence tending to show that, two days before the casualty occurred, he was found absent from his post, and discharged by the manager of the mines, but was taken back into the service upon his promising to be more attentive; that he absented himself from his post several times before he was discharged, and that just before the casualty occurred he was absent from his door, and was seen near the mouth of chamber No. 9. One of the company's witnesses also testified that when the eighth car, above mentioned, was brought out of the chamber, the mule-driver called to him (the deceased) to go back to his door, whereupon "he started down the entrance in a run." It is proven that the distance from the mouth of

chamber No. 9 to the intake door is 276 feet, and the force of the witness's testimony is consequently weakened by his further statement that it was not until four or five minutes afterwards that the "crash at the door was heard," when the deceased was killed. It certainly could not have taken four or five minutes for the deceased to run less than one hundred yards, and the jury were therefore warranted in inferring that he had time to return to his post at the door before the train started down the grade, and that he was not run over before he got there.

The defendant, however, in opposition to this view, also relies upon the fact that no blood was found upon the door, which was carried away by the front car. This necessarily shows, it is contended, that the deceased was not struck at the door, but at a point above the door, and that his body was dragged by the train to and through the door. We do not think so. No blood was found upon the track above the door, though some was found upon the ground just below the door; and the record shows that, for the deceased to open the door, it was necessary for him to cross the track, take hold of a handle on the door, and return to his place holding the handle. And hence the jury may have inferred that when the deceased was struck the door was partially open, and that his position on the track, with reference to the door, was such that he might have been struck by the train, and his body not driven against the door. At all events, the jury, whose province it was to weigh the facts of the case, found against the theory of the defendant, and we cannot properly say they were not warranted in so finding.

But it is contended that if the deceased was not killed before he reached the door, then, in view of the fact that no signal or order to open the door was given him, his attempt to open it in front of a rapidly approaching train was contributory negligence, which defeats a recovery. This position, also, is untenable. It by no means follows that the action cannot be maintained because the deceased, in attempting to open the door, acted without orders, or even contrary to orders. As we have seen, the space was only five feet between the car track and the western wall of the entrance at the door, where the deceased's post of duty was, and the jury may have believed that the deceased, seeing or hearing the approaching train, and fearing the consequences to himself of a collision between the train and the door, which was made of thick, heavy tim-

ber, and securely fastened, rashly attempted to open the door, and thereby lost his life. This the jury may have believed from the evidence, and yet the right to maintain the action is not thereby affected, if they also believed, from the evidence, as they evidently and reasonably did believe, that the company was negligent, and that the deceased was consequently put in peril, and that his act, under the circumstances, was such an act as an ordinarily prudent person might have been expected to do under like circumstances, although they may have further believed that the injury would not have happened if the act had not been done.

In Beach on Contributory Negligence, page 42, the principle is thus stated: "When a plaintiff, through the negligence of the defendant, is placed in a situation where he must adopt a perilous alternative, or where, in the terror of an emergency for which he is not responsible, and for which the defendant is responsible, he acts wildly or negligently, and suffers in consequence, such negligent conduct, under these circumstances, is not contributory negligence, for the reason that persons in great peril are not to be required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. In such a case, the negligent act of the defendant is the proximate cause of the injury, and the plaintiff may have his action."

This principle, which, in view of the tender years of the plaintiff's intestate, is peculiarly applicable to the present case, was recognized by the supreme court of the United States in *Stokes v. Saltonstall*, 13 Pet. 181, and by this court in *Richmond etc. R. R. Co. v. Morris*, 31 Gratt. 200, and in *Baltimore & O. R. R. Co. v. McKensie*, 81 Va. 71, and there is no better-settled principle of the common law.

It is needless to say more. We will add, however, in the language of the court in *Read v. Commonwealth*, 22 Gratt. 924, and as this court has repeatedly said, that where the jury and the judge who tried the cause concur in the weight and influence to be given to the evidence, it is an abuse of the appellate powers of this court—remote as it is from the scene of the transaction, having the evidence only on paper, divested of many elements which enter into every jury trial, and which from their nature cannot be presented on paper—to set aside the verdict and judgment because the judges of this court, from the evidence as it is written down, would not have concurred in the verdict.

The present case, viewed in the light of the rule applicable to a demurrer to evidence and of the principles indicated in this opinion, is with the defendant in error, and the judgment must be affirmed.

MASTER AND SERVANT—LIABILITY OF THE MASTER TO SERVANT—MACHINERY. — While the master is not an insurer of his servants' safety: *Railway Co. v. Rice*, 51 Ark. 468; and need not furnish them with the safest machinery: *Lehigh etc. Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680, and note; *Galveston etc. R'y Co. v. Garrett*, 73 Tex. 282; 15 Am. St. Rep. 781, and note; *International etc. R'y Co. v. Bell*, 75 Tex. 51; *Chicago etc. R. R. Co. v. Warner*, 123 Ill. 38; he is, however, bound to use reasonable care to supply reasonably safe machinery and appliances, and neglecting to do so, is liable to his servants for any injuries thereby occasioned: *Johnson v. Spear*, 76 Mich. 139; 15 Am. St. Rep. 298, and note; *Railway Co. v. Rice*, 51 Ark. 468; *Dobbins v. Brown*, 119 N. Y. 188.

MASTER AND SERVANT—INFANT EMPLOYEES—CARE REQUIRED OF. — Minor employees cannot ignore the duty of exercising common prudence with respect to apparent dangers: *Lehigh etc. Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680, and note.

NEGLECT—CONTRIBUTORY—SUDDEN DANGER. — One brought into danger by the wrong of another is not bound, when confronted by sudden and unexpected danger, to act with coolness and deliberation: *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; 10 Am. St. Rep. 136, and note. Compare *Reary v. Louisville etc. R'y Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497; *Harrie v. Clinton Township*, 64 Mich. 447; 8 Am. St. Rep. 842.

COFFMAN v. COFFMAN.

[85 VIRGINIA, 456.]

WILLS—AN HEIR CANNOT BE DISINHERITED EXCEPT BY THE TESTATOR LEAVING HIS PROPERTY TO ANOTHER. — Therefore, a will in which a father declares that it is his will that one of his sons be excluded from all of his estate, and have no heirship in the same, but in which no devise or bequest is made to any other person, does not divest the son of any part of his father's estate, and is not, unless it appoints an executor, entitled to admission to probate as a will.

APPEAL from a decree admitting to probate as a will an instrument which purported to be the last will and testament of Hiram Coffman, a copy of which is set forth in the opinion of the court.

William B. Compton, for the appellant.

Grattan and Stephenson, for the appellees.

LEWIS, P. A will is defined to be the disposition of one's property to take effect after death: *Bouvier's Law Dict.* Or, as

was said by Judge Richardson in *Carr v. Effinger*, 78 Va. 197, 202, "a will is an instrument for the sole purpose of disposing of one's property." Therefore, to sustain the decree of the circuit court in this case, two things must be implied from the paper in question: 1. That the decedent intended it as a disposition of his property to take effect at his death; and 2. That he meant to leave, and did leave, the whole of his estate to those persons standing in the relation of his heirs and next of kin other than the appellant, who is expressly excluded. On the other hand, the appellant contends that the instrument makes no disposition of the estate at all, and consequently that the decedent died intestate.

The paper is certainly an anomalous one, and none exactly like it is to be found in any case that has heretofore come before this court. The application, however, of certain well-settled principles to the case leads, we think, to the conclusion that the position taken by the appellant is the correct one.

It is a maxim that a testator can disinherit his heirs and next of kin only by leaving his property to others. Mere words of exclusion will not suffice; the estate must be actually given to somebody else. Though the intention to disinherit the heir be ever so apparent, said Lord Mansfield, in *Denn v. Gaskin*, Cowp. 657, he must of course inherit, unless the estate is given to somebody else. So in his celebrated argument in *Ackroyd v. Smithson*, 1 Bro. C. C. 503, 1 Lead. Cas. Eq. 872, Mr. Scott (afterwards Lord Eldon) said that the proposition that the heir at law is entitled to every interest in land not disposed of by his ancestor is so much of a truism that it calls for no reasoning to support it. It is not enough, he said, that the testator did not intend his heir to take; he must make a disposition in favor of another; otherwise the heir will take even against his intention, however plainly manifested. And the reason is, that the law provides how a man's estate at his death shall go, unless he by his will plainly directs that it shall be disposed of differently.

It is true, the devise or bequest need not be in express terms, and that it may be by necessary implication; but to justify such an implication, the intention of the testator must be so apparent that an intention to the contrary cannot be supposed; for otherwise the implication is not a necessary one: 1 Jarman on Wills, 532. Thus a devise to the testator's heir after the death of A gives to A a life estate by implication, because otherwise the devise to the heir, upon whom the law casts the property

in the absence of a disposition of it by the testator, would be rendered nugatory, and it would therefore be absurd to suppose that the testator meant to devise the land to his heir at the death of A, and yet that the heir should have it in the mean time. But no such implication arises where the devise is to a stranger after the death of A; for in such a case it is possible to suppose that the testator meant the heir to take the land during the life of A, and therefore an intention to give a life estate to A cannot be supposed. And this, says Jarman, is an exact illustration of the difference between necessary implication and conjecture.

According to Lord Mansfield, necessary implication is that which clearly satisfies the court what the testator meant by the words used. It is the opposite, he said, of conjecture, and leaves no room to doubt: *Wilkinson v. Adam*, 1 Ves. & B. 466; *Jones v. Morgan*, cited in 4 Bro. C. C. 460; Hawkins on Wills, 5.

Redfield lays it down that, in order to create a devise or legacy by implication, it must not be a case of mere slight probability, but something in regard to which most men would not be expected to raise any question. It must not rest upon conjecture. Neither is it required that the inference should be absolutely irresistible. It is enough if all the circumstances, taken together, leave no doubt in the mind of the court. The words of the will, he adds, must admit of no other implication: 2 Redfield on Wills, 203.

In Cruise's Digest, title Devise, chapter 10, section 19, it is said: "The courts have in some instances allowed a devise by implication, where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind the implication must be a plain and not merely a possible or probable one; for the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification." See also 3 Lomax's Digest, 148; Bac. Abr., tit. Wills, G; 2 Minor's Inst. 969; Schouler on Wills, sec. 479; *Wright v. Hicks*, 12 Ga. 155; 56 Am. Dec. 451; *Wilkins v. Allen*, 18 How. 385; *Bradford v. Bradford*, 6 Whart. 244; *Fitch v. Weber*, 6 Hare, 145.

The doctrine of devises by implication was very fully considered in *Boisseau v. Aldridges*, 5 Leigh, 222; 27 Am. Dec. 590. In that case, the decedent left a written instrument, as follows: "Not having made any will so as to dispose of my property, and two of my sisters marrying contrary to my wish,

should I not make one, I wish this instrument to prevent either of their husbands from having one cent of my estate, — say the husbands of my two sisters, Martha Aldridge and Dorothy Aldridge, — nor either of them to have one cent, unless they should survive their husbands; in that case, I leave them, to be paid out of the collection of any of my moneys, five hundred dollars each. Given under my hand and seal," etc. And on the paper was indorsed the following: "Memorandum to prevent Bennett Aldridge and Burwell Aldridge from having any part of my estate, that each might claim in right of their wives, without a will made by me."

It was argued by Messrs. Johnson and Leigh that, excepting the two contingent legacies, this writing was a devise and bequest by implication of the whole of the testator's estate to those persons who would take according to the statutes of descents and distributions, other than the two sisters and their descendants. The latter, they insisted, could have been excluded for no other purpose than to give the estate to others, and that if the testator did not mean that, he meant nothing.

But this view, though pressed upon the court with great earnestness and ability, was not adopted, and the decree of the lower court was affirmed, which declared that the right of a person to disinherit his heirs, or any one of them, exists, not as an abstract substantive power, but as the consequence of the power to leave his estate to others; that the paper in question was not a devise or bequest by necessary implication, and that it was evidently executed under the erroneous impression that if its author declared his intention to exclude his two sisters, the law would dispose of his estate among his heirs and next of kin, to the exclusion of the sisters mentioned therein.

It is true that two of the judges who delivered opinions in that case were of opinion that the instrument itself furnished internal evidence that it was not intended by the decedent to operate as a will any further than the contingent legacies therein bequeathed; but the principle that a man can disinherit his heirs only by unmistakably giving his estate to somebody else was none the less emphatically asserted. To hold otherwise, it was said, would give to a testator the power to repeal the statute of descents and distributions, so far, at least, as it affects his own estate.

It was also held that if in every case in which a testator declares an intention to exclude his heirs, or any one of them, it is to be implied from that alone that he intends to devise

away his estate from such excluded person or persons, the principle that, to disinherit his heirs, he must give his estate to somebody else would be of no consequence, since it would give effect to the simple disinherison by holding it tantamount to a positive disposition.

Another analogous principle affirmed in that case, and which is very material to the present, is this: That while the intention of the testator, when consistent with the rules of law, is the polar star to guide the judicial expositor of a will, yet his intention to dispose of his estate must be indicated with legal certainty, otherwise effect as a will cannot be given to the instrument; the true inquiry being, not what the testator meant, but what the words used import.

Judge Brooke, in his opinion, said: "When a testator has devised his estate by will, and is not precise as to the persons who are to take, or as to the quantity of estate they are to take, from necessity, and to effectuate his intention to dispose of his estate, and not to leave it to the law to dispose of, courts imply his intent as to persons, and the quantity of the estate they are to take. But when the question is, whether he intended to devise his estate or not, we are not authorized to imply that he does, unless it is a necessary inference from the language he uses."

He then referred to the case of *Denn v. Gaskin*, Cowp. 657, in which the testator gave his heir at law a disinheriting legacy, as it is called (i. e., he gave him ten shillings), and then gave his nephews real estate, without adding words of inheritance. He began his will thus: "As to all such worldly estate as God had indued me with," etc., and the question was, whether, by necessary implication from these words, and the intended exclusion of the heir, the life estate given the nephews was enlarged into a fee. Lord Mansfield held that it was not, although he said he suspected extremely that the testator meant to give the devisees an estate in fee, as he had no other landed property, and had made them residuary legatees of his personalty, and had disinherited the heir; but that if he did mean it, the misfortune was, that *quod voluit non dixit*. And he added the remark, already quoted from his opinion, namely, that, though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else. Accordingly, it was held that the fee, being undisposed of, descended to the heir, notwithstanding the intention of the testator to disinherit him; just as in *Boisseau v.*

Aldridges, 5 Leigh, 222, 27 Am. Dec. 590, the two excluded sisters were held entitled, not only to their contingent legacies, but to share in the residue of the estate as to which the testator died intestate, because, as was said, the statute gives the power to devise, and not in any other way to disinherit.

In *Wootton v. Redd's Ex'r*, 12 Gratt. 196, Judge Lee, speaking for the court, announced the same doctrine. He said: "Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed to sufficiently indicate. The law has provided a definite successor to the estate in the absence of a testamentary disposition, and the heir is not to be disinherited, unless by express words or necessary implication." The courts must therefore declare, if they can, he continued, "what intention the testator has expressed with sufficient legal certainty, not the intention which he may have entertained, but which he has failed sufficiently to manifest"; citing *Guy v. Sharp*, 1 Mylne & K. 589, 602; *Martin v. Drinkwater*, 2 Beav. 215. See also *Hatcher v. Hatcher*, 80 Va. 169; *Senger v. Senger's Ex'r*, 81 Va. 687; *Sutherland's Ex'rs v. Sydnor*, 84 Va. 880.

Let us now apply these principles to the present case. The paper in question is as follows: —

"I, Hiram Coffman, of Rockingham County and state of Virginia, do make and ordain this to be my last will and testament, hereby revoking all other wills heretofore by me made. It is my will that my son, William H. Coffman, be excluded from all of my estate at my death, and have no heirship in the same, he having become the heir to his mother's interest in her father's estate, and I, his guardian, have paid him, and am now about to make a final settlement with him, which will make as much to him, and probably more, than my estate will pay to each of my other legal heirs. In witness of this being my last will and testament, I hereunto set my hand and annex my seal this the tenth day of March, 1877.

"HIRAM COFFMAN. [Seal.]"

Now, this paper is certainly in the form of a will, and was declared by the decedent to be his will, and his intention to exclude his son, William, the appellant here, is as plainly manifested as it well could be. But is it in substance a will? Does it dispose of anything? The circuit court held that by implication it does. But is such a conclusion a necessary implication from the words used? Can the words be said to have

no other signification? Taken together, do they clearly satisfy the mind, leaving no room to doubt, that the decedent meant to dispose of his estate? We think not. On the contrary, fairly construed, the instrument simply revokes all other wills theretofore made by the decedent, and excludes the appellant, giving the reason therefor. That is all; and to hold that it amounts to anything more would render futile the principle that a man can disinherit his heirs only by giving his estate to somebody else, and, by carrying too far the doctrine of devises by implication, would, by judicial construction, make a will for the decedent that he has not made for himself.

The record presents the case of a man who has a valuable estate and a wife and five children,—a son by his first marriage, another son by his second marriage, and three children by his third and last marriage. All his children are equally near and all, presumably, are equally dear to him. The eldest son has already inherited property, equal in value, we will say, to one fourth of his father's estate. Accordingly, the father, wishing to do what he considers justice to all his children, writes a paper, which he calls a will, and in that paper he says in substance that he wishes to disinherit his eldest son; and then, lest his motive be imputed to a want of parental affection (we will assume), he goes on and gives the reason for wishing to exclude him, and there he stops. He does not say his "other legal heirs" are to have the estate, but that his eldest son is not to have any part of it. And from this we are asked to imply that he intended to give, and consequently, as a legal conclusion, to hold that he did give, the whole of his estate to his other children; in other words, to hold that the reason assigned for wishing to exclude one of the children operates a disposition of the estate to the other children.

But this view is contrary to the plainest principles of the law, as we have already seen; for the question is, not what the decedent intended, but, What has he said? Not what he may have thought would be the result of what he wrote, but, What is the legal effect of the paper? And although he may have intended to dispose of his estate, yet if he has not said so with legal certainty, we cannot alter or add to his words; but our judgment must be, as Lord Mansfield's was in *Denn v. Gaskin*, Cowp. 657, *Quod voluit non dixit*; for we sit here, not to make wills, but to construe them; not to make law, but to administer it.

It is quite probable the paper was written by the decedent

under the erroneous impression that if he would declare his intention to exclude the appellant in the form of a will, the statute of descents and distributions would step in and do the rest,—i. e., that it would, in effect, make a better will for him than he could make for himself, by giving his estate to his other heirs and next of kin,—and hence he made no disposition of it. His language, we think, shows this. Had he stopped at the point where he declares the appellant is to have no heirship in the estate, there could be no controversy, notwithstanding the paper, in the introductory part, is called a will. This is conceded, and yet what follows merely shows why he wished to exclude him, which is a very different thing from actually excluding him by disposing of his estate, no matter what his intention was. For in such a case an intention not expressed or clearly manifested is equivalent in law to the absence of a testamentary intent altogether.

And herein lies the error of the decree complained of, namely, in giving effect to the intention of the decedent to exclude the appellant by making it tantamount to a disposition of the estate to the other children, which can no more be rightly done than the starting of a person on a journey can be said to be, in legal contemplation, the arrival of such person at the point of destination. And so here, the decedent, intending to exclude the appellant, started out well enough in that direction, but, unfortunately for the appellees, he stopped before he reached the legal consummation of his purpose.

That, in order to effect that purpose, he would have gone further, and given his estate in unmistakable terms to his other children, if the necessity for so doing had occurred to him, is also probable; for it is impossible to read the paper in question without perceiving that the thought uppermost in his mind was to exclude the appellant. But the idea that, under any circumstances, he would have done so rests upon conjecture merely, which is not necessary implication, but the opposite, and can never alone support a devise or bequest. In *Jones v. Morgan*, cited in 4 Bro. C. C. 460, Lord Mansfield said that "conjecture is, when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it." And he added: "You are not to conjecture what he would have done in an event he never thought of; that will not do": *Fearne, Rem. App.* 576.

Every man, it is true, is presumed to know the law; but to

say that the decedent must be presumed to have known that the mere exclusion of the appellant would not operate to give the estate to anybody else, and therefore that he meant to give, and consequently did give, the estate to his remaining children is, substantially, to assert a proposition which has been emphatically repudiated by this court, and by all courts where our system of jurisprudence prevails.

Moreover, no executor is appointed by the paper in question, nor is there any mention of the debts of the decedent, or of the widow's dower or interest in the estate, or any direction as to how the estate shall be divided or disposed of; and while it is true the law provides for the payment of debts, the assignment of dower, etc., yet the omission to make mention of any of these matters is a circumstance in the case not without significance, as tending to support the view already expressed. Persons often die intestate, but it is certainly not usual, nor can it hardly be said to be natural, for a man having a valuable real and personal estate to leave a will disposing of it, and make no specific devises or bequests, or give any direction touching the estate whatever. And here there is no direction as to anything, but simply a revocation of previous wills, and an intended disinherison of the appellant, because, in the language of the decedent, the appellant's inheritance from another source "will make as much to him, and probably more, than my estate will pay to each of my other legal heirs," — words which, of themselves, import intestacy, being emphatically words of inheritance. And as to the word "pay," upon which so much stress is laid by counsel for the appellees, that is quite as applicable to the distribution of an estate of an intestate as to any other.

Again, suppose the appellant had died before the decedent, leaving descendants. What is there in this paper to prevent those descendants, as heirs at law of the decedent, from sharing in the estate? There is certainly nothing that would expressly exclude them, and this circumstance also strengthens the view that the paper was written, not to dispose of anything, but simply to revoke previous wills, and to exclude the appellant, without going, or intending to go, further than to give the reason.

Our conclusion, therefore, is, that the paper is not the will of the decedent; that if he meant to dispose of his property, he has not said so with legal certainty; and consequently that at his death his estate passed to his heirs and next of kin.

including the appellant. It is certainly safer, and more consonant with public policy, to closely adhere to settled principles, than in doubtful cases to interrupt the course of descent and distribution of estates which the statute prescribes in cases of intestacy; for the statute, which has been said to be a transcript of the human affections, is a wise and just one, and ought to govern in all cases not plainly without it.

In *Boisseau v. Aldridges*, 5 Leigh, 222, 27 Am. Dec. 590, it was said by Judge Brooke, and reaffirmed by the court, without dissent, in the recent case of *Sutherland's Ex'rs v. Sydnor*, 84 Va. 880, that property is the creature of the law, and can be disposed of at all, only because the law permits it to be done in certain modes. And hence the result in the present case imposes no hardship on any one, as it puts all the children of the decedent on the same footing with respect to his estate, simply because their father has not availed himself of the permission that the law gave him to dispose of it differently.

The decree must therefore be reversed, and a decree entered here in conformity with this opinion.

WILLS — DISINHERITING OF AN HEIR. — An heir cannot be disinherited, unless the estate is given to somebody else: *Boisseau v. Aldridges*, 5 Leigh, 222; 27 Am. Dec. 590; *Doe v. Lanus*, 3 Ind. 441; 56 Am. Dec. 518, and note. Compare *Stephenson v. Doe*, 8 Blackf. 508; 46 Am. Dec. 489.

PHILLIPS v. FERGUSON.

[85 VIRGINIA, 808.]

WILL — CONVERSION OF PERSONALTY INTO REALTY. — MONEY DIRECTED TO BE LAID OUT IN LAND must be considered as real estate, unless the object of the conversion fails, and then, to the extent of such failure, the undisposed portion of the fund remains unconverted.

MARRIAGE — CONDITION PRECEDENT IN RESTRAINT OF MARRIAGE, and under the operation of which the estate, because of the marriage, never vests, is valid. Therefore if the will declares that if any of the testator's children marry into a designated family such children shall not share in a particular devise, and afterwards, in the lifetime of the testator, a child marries into such a family, it never acquires any interest in the devise. With respect to bequests of personalty, the rule is the same if the restraint is partial and reasonable, but the condition is disregarded if the restraint is general or unreasonable.

MARRIAGE — CONDITION IN RESTRAINT OF, IS REASONABLE if it merely tends to restrain children from marrying into the family of a person designated.

The word "family," as here used, means children of the person named, whether adults or minors.

WILL. — PAROL EVIDENCE IS ADMISSIBLE to show who was the person whom the testator designated by a particular name.

ACTION for the construction of a will. In this will, the testator, among other things, directed that five thousand dollars be laid out in land to be divided among six of his children. The residue of his property was to be divided among all his children, of whom there were eight. He further declared, by his will, that "if either one of my children, above named in my will, should marry in T. W. Phillips's family, I only give to him or her the sum of three dollars to be their part, and to be all that him or her is to receive under the will, and the foregoing clause of this will that leaves them anything to be revoked, and all other portions of this will that provides for same child." The testator died in June, 1884. Prior to his death, but after the execution of his will, one of his daughters married the son of T. W. Phillips. The trial court decided that the daughter who had married Phillips's son was not entitled to any portion of the devise of five thousand dollars to be laid out in land, but that she was entitled to one eighth of the residue of personalty bequeathed by the residuary clause, and to the three dollars specified in the will. Thereupon the daughter appealed.

G. S. and D. M. Bernard, for the appellants.

John Lyon, for the appellees.

LEWIS, P. 1. It is clear, as the circuit court held, that, for the purposes of the will, so far as the female appellant is concerned, the money directed by the fourth clause to be laid out in land must be considered, upon the principle of equitable conversion, as real estate: *Craig v. Leslie*, 3 Wheat. 563; *Pratt v. Taliaferro*, 3 Leigh, 419; *Effinger v. Hall*, 81 Va. 94, and cases cited. Inasmuch, however, as we are also of opinion that she takes nothing under the will (save the legacy of three dollars), the object of the conversion, to that extent, fails, and consequently the undisposed of portion of the fund directed to be so invested, results, in its unconverted form as personalty, to the executors for the residuary legatees other than herself: 3 Pomeroy's Eq. Jur., sec. 1172; 1 Lead. Cas. Eq., 4th ed., 1187, 1202, notes to *Ackroyd v. Smithson*; 2 Redfield on Wills, 115.

The condition on which the devise was made to the children,

of which she was apprised by the testator in his lifetime, and before her marriage, has not been observed by her, and its observance was essential to the vesting of any estate under the will. The common law, although it does not allow a condition in restraint of marriage generally and absolutely, when annexed to a gift of lands, or of legacy charged on land, to defeat an estate, yet if the condition be precedent, a breach of the condition prevents the estate from vesting, no matter how restrictive of marriage it may be. If, however, it be subsequent, then its effect depends on whether it is reasonable or not.

In the present case, the condition in question is not subsequent, so far, at least, as the female appellant is concerned. A condition subsequent is one the effect of which is to enlarge or defeat an estate already created: 1 Lomax's Digest, 262. But here, as we have said, without a compliance with the condition, no estate in the land can vest at all; and as the prohibited marriage occurred before the testator's death, and therefore before any estate under the will could commence, it is clear that no estate in the land has ever vested in the female appellant, or ever can vest in her, under the will of her father; and hence, also, no question of forfeiture arises in the case, as to which much was said in the argument at the bar by counsel for appellants.

2. With regard to the personal property bequeathed by the residuary clause of the will, somewhat different principles, derived in part from the civil law, apply. As to this, it is contended that the interest of the female appellant is absolute, because, as her interest is not given over to some one else, the condition in question is only *in terrorem*.

This position would be well taken if the condition were subsequent; for the settled doctrine is, that where a personal legacy is given on a condition in restraint of marriage, and the condition is not precedent, but subsequent, and is afterwards broken, and there is no disposition over, then the condition is construed as *in terrorem* merely; and a mere gift of a residue is not considered a bequest over. There must be distinct provision that the legacy shall vest in a third person or sink into the residue on the breach of the condition; otherwise the legacy becomes pure and absolute. If, however, the condition be precedent, and not unreasonably restrictive of marriage, the legacy takes effect only upon the condition being observed: 1 Story's Eq. Jur., sec. 290.

The system, as will thus be seen, is somewhat incongruous, being, as it is, the result of a blending of the doctrine of the civil law, that marriage ought to be free, with the principles of the common law already adverted to.

The law upon this whole subject is well summarized in a valuable treatise as follows: "If a condition (in restraint of marriage) is precedent, and annexed to a gift of land (or of any interest arising out of land), it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature. When annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent, and annexed to a gift of land (or of any interest arising out of land), if general, it is void, and although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases, and the gift over takes effect; but if there is no gift over, then the condition is said to be *in terrorem* merely, and is inoperative": 2 Pomeroy's Eq. Jur., sec. 933. See also *Maddox v. Maddox*, 11 Gratt. 804; 2 Lead. Cas. Eq. 144, notes to *Scott v. Tyler*; 1 Story's Eq. Jur., sec. 289; 2 Lomax on Executors, 79; 2 Minor's Inst. 245 et seq.

The question therefore arises in the present case, Is the condition in question reasonable? The appellants deny that it is, insisting that it is unreasonably restrictive of marriage, and therefore void upon grounds of public policy. But no authority has been cited which goes to the extent of holding that such a condition is invalid, and doubtless none can be found. No inflexible rule on the subject is deducible from the cases, many of which are irreconcilable. The law, however, as we have seen, recognizes as valid conditions in restraint of marriage which are just, fair, and reasonable; and what is such a condition must, to a great extent, be determined upon the circumstances of each particular case.

A condition not to marry a Scotchman, or a Papist, or that the widow of the testator shall not marry again, has been held valid, and no reason is perceived why, ordinarily, a prohibition to marry into a particular family is not equally good, certainly when, as is the case here, the word "family" is used in

its primary and restricted sense. It is not a technical word, and, being of flexible meaning, it must be construed according to the context of the will. In one sense, it means the whole household, including servants, and even boarders and lodgers. In another, it means all the relations who descend from a common ancestor. Its primary meaning, however, is "children," and so it must be construed in all cases, unless the context shows that it was used in a different sense. An authority in point is *Pigg v. Clarke*, L. R. 3 Ch. Div. 672, in which case the master of the rolls, in delivering judgment, said: "Every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of 'family'? It is 'children'; that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion." So in *Hill's Ex'r v. Bowman*, 7 Leigh, 650, a trust for the purpose of aiding any of the members of the testator's family was held sufficiently certain, and sustained accordingly. See also 2 Jarman on Wills, 90 et seq.

3. It is also clear that parol evidence was admissible in the present case to show who the individual was to whom the testator referred as T. W. Phillips, what family he had, and the relations existing between him and the testator. Such evidence is admissible to enable the judicial expositor of the will, as was said in *Hatcher v. Hatcher*, 80 Va. 169, to place himself, figuratively speaking, in the very shoes of the testator, and, in the light of all the surrounding circumstances, to ascertain his meaning. "Thus," says Greenleaf, "if the language of the instrument is applicable to several persons, to several parcels of land, etc., or if in a will the words 'child,' 'children,' 'family,' etc., are employed, in all these and the like cases parol evidence is admissible of any extrinsic circumstances tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the rule, which only excludes parol evidence of other language declaring his meaning than that which is contained in the instrument itself": 1 Greenl. Ev., secs. 288, 289; *Senger v. Senger's Ex'r*, 81 Va. 687; *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229; *Mann v. Mann's Ex'rs*, 1 Johns. Ch. 231; *Colton v. Colton*, 127 U. S. 300.

With the aid of such extrinsic circumstances in construing

the will before us, there can be no doubt as to the testator's meaning. It appears that for many years before his death he had been at enmity with the said T. W. Phillips, who lived in his neighborhood, and for this reason imposed in his will the condition above mentioned. The will was executed soon after his consent to the marriage of his daughter, the female appellant, with William T. Phillips had been sought in vain, and of all which she was informed at the time. But, in the language of the record, "she deliberately chose to defy her father's anger, and stick to her lover," and she must now bear the consequences of her choice. Nor is the case affected by the fact that when the marriage occurred the male appellant was over the age of twenty-one years, and independent of his father, as that does not at all change the family relations of the parties, within the meaning of the will.

4. It need only be added that the testator evidently intended the condition to take effect from the date of the will, and consequently effect must be given to it accordingly. The provision of the will is, that in the event of a prohibited marriage, the will, as to the child or children so offending, shall be deemed revoked, except as to the legacy of three dollars; and this language manifests the intention of the testator too plainly to be misunderstood. Technically speaking, a will can be revoked only in the testator's lifetime, but in the present case the term undoubtedly was used in a broader sense; that is to say, not only to apply to a prohibited marriage which might take place after the date of the will, in the testator's lifetime, but after his death as well. In other words, the testator, by the language used, evidently intended to make a compliance with the annexed condition not only essential to the vesting of an estate under the will, but to a continuance of any such estate after it had once vested; and this it was competent for him to do by virtue of the statute which enacts that a will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will: Code, sec. 2521; *Thorndike v. Reynolds*, 22 Gratt. 21.

It follows that the decree, as respects the personalty bequeathed by the residuary clause of the will, is, as the appellees insist, erroneous. It will therefore be reversed in this particular, and in all other respects affirmed.

84 MARSHALL v. FARMERS' ETC. SAVINGS BANK. [Virginia,

WILLS — EQUITABLE CONVERSION. — As to the law respecting equitable conversion, see *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400, and note; extended note to *Ford v. Ford*, 5 Am. St. Rep. 141-148.

WILLS — CONDITIONS — RESTRAINT OF MARRIAGE. — The general subject of devises and conditions in restraint of marriage is treated at length in the note to *Coppage v. Alexander*, 38 Am. Dec. 156-161. See also note to *Hots's Estate*, 80 Am. Dec. 493, 494.

WILLS — CONSTRUCTION — EXTRINSIC EVIDENCE. — Extrinsic evidence is admissible to aid in the exposition of a will only in those cases where, from some ambiguity or obscurity, a difficulty arises in applying the words of the wills: *In the Matter of Wells*, 113 N. Y. 306; 10 Am. St. Rep. 467, and note.

MARSHALL v. FARMERS' AND MECHANICS' SAVINGS BANK OF ALEXANDRIA.

[35 VIRGINIA, 676.]

CORPORATIONS. — DIRECTORS OF A BANK MUST EXERCISE ORDINARY CARE AND DILIGENCE, and are answerable for losses resulting from mismanagement of its business affairs. They must show reasonable capacity for the position they accept, and use in it their best discretion and industry, and a scrupulous conscientiousness in every matter, and obey accurately the requisitions of the charter and of the general law.

CORPORATIONS. — IGNORANCE ON THE PART OF DIRECTORS OF A BANK of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited.

CORPORATIONS. — DIRECTORS OF A BANK OWE A DUTY TO ITS DEPOSITORS, and in the scrutiny of possible breaches of this duty the rigid rules which govern trustees have been applied. To exculpate a director, it is not sufficient that no actual dishonest action be shown, or that he cannot be proved to have been influenced by interested motives.

CORPORATIONS. — DIRECTORS ARE BOUND TO MANAGE THE AFFAIRS OF A CORPORATION WITH THE SAME DEGREE OF CARE and prudence which is generally exercised by business men in their own affairs. They must be diligent and careful in performing the duties they have undertaken, and they cannot excuse any imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences.

CORPORATIONS. — A DIRECTOR OF A BANK UNDERTAKES THAT HE POSSESSES AT LEAST ORDINARY KNOWLEDGE AND SKILL, and that he will bring them to bear in the discharge of his duties. If, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents or co-directors, which ordinary care on his part would have prevented, he is personally liable for the loss resulting.

CORPORATIONS. — BANK DIRECTORS ARE LIABLE TO THE DEPOSITORS FOR LOSSES resulting from the fact that such directors did not attend to the

business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, or from not being properly protested, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrong-doings will not exonerate him, because he could not be without such knowledge, except from his own negligence.

Suit for the purpose of holding the directors of the defendant bank personally responsible for losses to depositors resulting from gross negligence and inattention. The trial court dismissed the complainant's bill.

Francis L. Smith, for the appellant.

S. F. Beach, Charles E. Stuart, George A. Mushbach, and J. M. Johnson, for the appellees.

LACY, J. This suit was brought by the appellant, James A. Marshall, for himself and on behalf of the other creditors of the appellee corporation, the Farmers' and Mechanics' Savings Bank of Virginia, a broken bank, to reduce into possession and distribute among said creditors the assets of the said bank, and to charge the individual defendants, who were the officers and directors of said bank, with the difference between the assets and liabilities of the said bank, upon the ground that the said directors had not had a meeting for at least one year prior to the first day of December, 1876, the date of the suspension and failure of the said bank, and for at least one year prior to the ascertainment of the embarrassed condition of said bank, which occurred some time before its said suspension, and that they did not give that care, supervision, and attention to the business affairs of said corporation which the duties of the office and the nature of the trust reposed in them required; but, on the contrary, neglected the same, and intrusted entirely the business concerns of the bank to the president and one, and possibly two, directors, who recklessly and improvidently loaned the money and securities of the said defendant corporation to various embarrassed and insolvent corporations, firms, and individuals, without taking proper and sufficient security for the protection of the depositors and creditors of the said bank, and being themselves connected with or interested in said embarrassed and insolvent corporations; by reason of which said conduct upon the part of said directors the appellant insists that heavy

losses have fallen upon the bank, and that the said directors are individually and personally liable to the depositors and creditors of the said bank for the losses so occasioned by the neglect of the duties of their office as directors. The bank answered the bill of the plaintiff through its president, and the directors answered individually, wherein negligence is denied; and it is also denied that the business of the bank was intrusted wholly to the president; but it is admitted that, "instead of regular formal weekly meetings of the board as prescribed by the by-laws of the bank, informal meetings were substituted, it being proven soon after the bank went into operation that formal weekly meetings were unnecessary."

The questions involved were referred to a commissioner in chancery for examination and report. The commissioner reported that the said directors not only did not exercise ordinary care and diligence, but that they were guilty of gross negligence.

1. That the board of directors only met in 1873 three times; in 1874, twice; in 1875, once; in 1876, twelve times; in 1877, five times; in 1878, once.

2. That from the organization of the bank down to its suspension, December 1, 1876, there never was an examination made by the board of directors, or by any committee appointed by them, of the books, papers, funds, stocks, or bonds of the bank, or statement called for from other banks of the account of the said the Farmers' and Mechanics' Savings Bank with them.

3. That, notwithstanding the fact that a committee was twice appointed for the purpose, an examination was never made of the books, and no report ever made or called for from the committees appointed.

4. That the president, without authority, took from the cash-drawer, from time to time, sums of money aggregating \$2,187.33, leaving nothing but tickets for the said sums of money; that in 1874 the said president caused McKim & Co., of the city of Baltimore, to sell the coupon bonds issued by the said the Farmers' and Mechanics' Savings Bank, and deposited with the said McKim & Co., and appropriated the proceeds to his own private use, and never made any entry on the books of the bank prior to September, 1876, overdraw his account \$341.64, and in other ways converted to his own use the property of the bank,—said several sums aggregating \$11,713.97; that the directors negligently failed to look at the

books, into the cash-drawer, or exercise any care whatever to discover these things, and when at last the facts did come to their knowledge they did not remove, but continued, this president, and allowed him to manage the books of the bank almost alone.

5. The account of the Alexandria Passenger Railway Company, which had this same president of the bank for its president for a time, and a director of this bank for its president afterwards, and whose treasurer was the cashier of this bank, was overdrawn \$11,341.91, which was decreased, crediting notes aggregating \$6,500, which were neither paid nor renewed, and the overdraft continued to increase until the suspension of the bank, which was at that time \$7,530.45, but was manipulated so as to make it appear to be only \$674.53.

6. That one P. B. Stilson borrowed \$2,000 by depositing the notes of one J. A. Clark for \$4,000 secured by a deed of trust in Maryland, and also the notes of one B. G. Daniels. The Clark note was perfectly good, and in November, 1873, Stilson was allowed to withdraw it and only leave the Daniel notes, which were perfectly worthless.

7. That the Washington and Ohio Railroad Company, whose president was for some years one of the directors of this bank, was loaned, on May 8, 1872, \$5,000, without a meeting of the board, and when the whole balance on hand was \$9,373.98; July 5, 1873, \$3,000 were lent, when only \$6,396.71 were on hand; and on July 17, 1872, \$5,000 were lent, when only \$3,238.49 were the balance on hand; that nothing was ever paid on these notes until the appointment of a receiver. There were numerous other notes, aggregating large sums, for the security of which the bank held second mortgage bonds of the road, which proved to be worthless. The commissioner says that, from the testimony, it may be possible to class the original transaction of making the loan to this company as an error of judgment, but it was more than an error of judgment to sit idly by when the said company did not have the means to pay its renewals, nor take the trouble to renew the notes when they became due, and make an effort to collect the debt, or to require additional security; especially when the testimony discloses that nearly every one else who had loaned money to the road was demanding and receiving additional security, and that the said the Farmers' and Mechanics' Savings Bank was almost the only holder of the notes of the said company, and that the

dividends on the collaterals were not sufficient to pay the notes. The evidence shows that the bonds of the company were sold to pay interest, and that the published statements of the condition of the company disclosed the fact that the earnings of the company were not sufficient to pay the operating expenses and interest on the debt.

8. That Jameison and Collins owed the bank at suspension \$3,311.62, for which there were no security, and no indorser except one of the makers, and that a new note was discounted for them amounting to \$1,211.62, a few months before the suspension of the bank, to wit, on the 30th of August, 1876; this Jameison being the brother of the president.

9. Robert Jameison, himself not solvent, and the brother of the president, with indorsers, both worthless, was loaned thousands of dollars, and at the suspension owed \$2,300, some of his paper being altogether without an indorser; and the books of the bank showed that a note of Jameison's for \$500, deposited for collection by W. F. Vincent, was protested November 8, 1873; and he reports the names of the directors, and their several periods of service. The capital stock of this bank was only \$10,000, and of that only \$6,200 were paid at the time of the suspension of the bank. The bank closed its doors and ceased to do business December 1, 1876. An assignment of assets was made September 18, 1877. A receiver was appointed May, 1878. The commissioner classifies the directors and their periods of service, and ascertains the amount for which the several classes are, in his judgment, liable. He ascertained that Robert Bell, Jr., Emanuel Francis, William Cogan, Andrew Jameison, and the estate of John W. Stewart are severally liable for principal and interest to March 15, 1886, \$38,574.32; that said Robert Bell, Jr., Emanuel Francis, William Cogan, Andrew Jameison, and John W. Stewart were directors of the bank from its organization to the appointment of a receiver; that Lewis Stein's, John P. Agnew's, and John C. Graham's estates are severally liable for the amount of \$35,917.09, the said Lewis Stein, John P. Agnew, and John C. Graham having been directors from May 13, 1873, to the appointment of a receiver; that Lewis McKenzie's and Jefferson Tacey's estates are severally liable for \$21,682.71.

This report was excepted to: 1. To the amount of principal ascertained by the commissioner to be due to the depositors,

and allowing six per centum interest thereon; 2. To the amounts ascertained by the commissioner to be due from the several debtors of the defendant bank, and also to the amount of the overdraft of the Alexandria Passenger Railway Company; 3. To the special commissioner's finding the facts proved; 4. To the conclusions of the said report by which they are held responsible for the several sums reported as respectively chargeable to them on account of alleged negligence, and of improper conduct in the discharge of their duties as directors; the evidence taken in the cause being wholly insufficient, as these defendants allege, to show any negligence or improper conduct which show either of said defendants so liable.

On the 30th of March, 1887, the circuit court of Alexandria City rendered a decree in the cause, whereby "the said report, so far as it finds the directors of the Farmers' and Mechanics' Savings Bank, or any of them, personally responsible for the losses sustained by the bank, be and the same is overruled, it appearing to the court that no such dereliction of duty on their part is shown as to fix upon them such personal liability; and that as to the said directors, and the personal representatives of such as are dead, the plaintiff's bill be and the same is hereby dismissed, with costs. It is further adjudged, ordered, and decreed that the said report be and the same is hereby confirmed and ratified in all other particulars." From this decree the plaintiff applied for and obtained an appeal to this court.

By the appellees no error is assigned, so the question involved here does not raise any other question than the single inquiry, Was there such negligence on the part of the directors of this bank as to make them, or any of them, personally liable for its losses? There is no dispute as to what the losses have been, and their several amounts, and of the terms or periods as to which each director is liable, if at all. The appellees insist, through their learned counsel, that, while there have been errors of judgment and unfortunate loans made, there has been no negligence. The liability of directors for losses growing out of their mismanagement of the concerns of the bank, and their negligence in the discharge of their duties, has been often the subject of judicial investigation and decision. It is a question at this day well understood by the profession, and is not controverted to any degree by the learned counsel in this case. We find the settled rule upon this subject well stated in a recent work of great practical usefulness.

The American and English Encyclopædia of Law, under the head "Banks," speaking of directors, says: "The directors of a bank have the general control and government of its affairs, and constitute the corporation. They are bound to exercise ordinary skill and diligence, and are liable for losses resulting from mismanagement of the affairs and business of the bank"; citing *Society v. Underwood*, 9 Bush, 609, which appears to have been criticised in *Zinn v. Mendel*, 9 W. Va. 580-597, and by Mr. Redfield in 13 Am. Law Reg., N. S., 218; *Dunn v. Kyle*, 14 Bush, 184; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Chester v. Halliard*, 34 N. J. Eq. 341; *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684. There it is further said: "But for excusable mistakes concerning the law, and for errors of judgment when acting in good faith, they are not liable"; citing *Spering's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; *Dunn v. Kyle*, 14 Bush, 184; *Godbold v. Branch Bank*, 11 Ala. 191; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624. See 2 Am. & Eng. Ency. of Law, 114, 116. Morse, in his work on banks and banking, says: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both: *Hodges v. N. E. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624. They may be held to account to an injured party in a court of chancery (*Bank etc. v. St. Johns*, 25 Ala. 566), or they, or any one of their number who shared in the wrong-doing, may be sued at law for damages: *Conant v. Seneca Co. Bank*, 1 Ohio St. 298. . . . They are required simply to show a reasonable capacity for the position they accept; to use in it their best discretion and industry; to show the scrupulous *bona fides* and conscientiousness in every matter, however minute, which is exacted rigorously from all trustees of the property of others; and to obey accurately the requisitions of the charter, or of the general law under which they are organized": Morse on Banks and Banking, 133.

Mistakes as to what is the law serve to excuse cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases, if the directors feel any doubts, they may be guilty of neglect if they fail to seek and be guided by competent legal advice. But ignorance of any fact in the bank's affairs, which it is their duty to know, can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited:

Morse on Banks and Banking, 135. The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trust*, respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director that no actual dishonesty can be shown; that he cannot be positively proved to have been influenced by interested motives: Morse on Banks and Banking, 113, 114. Mr. Morawetz, in his work on private corporations, says as to the degree of care to be exercised (section 552): "Attempts have been made to define the degree of care and prudence which directors must exercise in the performance of their duties. In some of the cases it has been said that inasmuch as directors are usually not paid for their services, they are to be regarded as mandataries,—persons who have gratuitously undertaken to perform certain duties, and are bound to exercise only ordinary care and prudence,—and that they are liable to the corporation only for what is called *crassa negligentia*, or gross negligence. But all this is, at the best, misleading. The plain and obvious rule is, that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances; the character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts must be taken into consideration. It is evident that no abstract reasoning can be of service in reaching a proper solution."

Directors, as trustees of a corporation, are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs: *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Charitable Corporation v. Sutton*, 2 Atk. 405;

Litchfield v. White, 3 Sand. 545; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624. Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences. See the case of *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, Earl, J., saying, in delivering the opinion in that case: "One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the discharge of his duties. Such is the rule applicable to public officers, to professional men, and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook, not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust." Directors can never set up as a defense that they were ignorant of a provision of the company's charter or by-laws. See *Spring's Appeal*, 71 Pa. St. 11; 10 Am. Rep. 684; and the opinion of Chief Justice Greene in *Hodges v. N. E. Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624.

We cannot better close the discussion upon this question than by citing the case of *Bank v. Bossieux*, 4 Hughes, 398, much relied on by the learned counsel for the appellant, who says: "This question has been the subject of investigation and judicial determination by the United States circuit court for the eastern district of Virginia. Judge Hughes, in an elaborate opinion, stating the law with great force and clearness, exhibiting a thorough and patient examination of all the authorities, held the defendant directors liable upon this ground: 'Gross inattention and negligence, allowing fraud or misconduct on the part of agents, officers, or

co-directors which could have been prevented if they had given ordinary care and attention to their duties.' Indeed, this opinion is not only the most thorough examination, but the ablest exposition of the law upon the subject the writer has been able to find after examining many authorities, and he might well be content to rest the law of this case upon the opinion of Judge Hughes. In it he reviews the case of *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, and shows that the very principle was declared in that case upon which he found the directors of the Dollar Savings Bank liable. He declares that 'negligence may be of such a character as to amount to fraud'; citing *Jones's Ex'rs v. Clark*, 25 Gratt. 655, and *Neal v. Clark*, 95 U. S. 707. In that case, Judge Hughes says: "It will abundantly appear, from authorities and reported cases to be cited in the sequel, that the managing officers of corporations are personally liable for the results of gross negligence, or what the jurists call *crassa negligentia*. If, by reckless inattention to the duties confided to them by their corporation, frauds and misconduct are perpetrated by officers, agents, and co-directors, which ordinary care on their part would have prevented, then I think it may be said with truth that it is now elementary law, to be found in all the books, that directors are personally liable for the losses resulting. Moreover, all authorities now tend to the conclusion that directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and creditors of trustees to *cestuis que trust*, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust": *Bank v. Bossieux*, 4 Hughes, 398, and the authorities cited in the opinion.

We will now proceed to briefly review the facts of this case, to which this well-established rule of law is to be applied. The question arises in this case as between the directors and the depositors, and not between the directors and the stockholders. The by-laws of this bank prescribed weekly meetings. It is conceded that these were scarcely ever held, the answers admitting that formal meetings were not held. The decree of the circuit court of Alexandria City, that it appears to the court that there has been no such dereliction of duty on the part of the directors, or any of them, as to fix upon them personal responsibility, cannot be sustained upon any sound principle whatever. Upon what principle can Andrew Jameison be held not to be personally liable for the acts already

detailed concerning him? The commissioner reports that he took \$2,187.33 out of the cash-drawer; that he withdrew without authority the bonds of the bank, deposited elsewhere, caused their sale, and appropriated the money to his own use; overdraw his account \$341.64; and in other ways converted to his own use the property of the bank, aggregating \$11,713.97. The passenger railway company was allowed to overdraw its account to the amount of thousands (\$11,341.91) at one time. The notes of the company were discounted to the amount of \$6,500, and at maturity neither protested, renewed, collected, nor sued on, and the overdraft was allowed to increase for a year and more, without security, until it reached \$7,530.45, which were entirely lost to the bank; he being the president of this company part of the time and one of the bank directors being president of the company the other part of the time in question, while the treasurer of the railway company was the cashier of this savings bank. Stilson was allowed to withdraw the sole valuable security for his note of \$2,000, and that was lost. He lent his brother \$3,311.62 practically without any security, and that was lost, and actually lent him \$1,211.62 a few months before the bank closed its doors, lending to Robert Jameison, with no security, except worthless indorsers, \$2,300, when he had already gone to protest on a note of \$500.

But the co-directors seek to escape responsibility for all this, including the large loss to the Washington and Ohio railroad, by claiming to have no actual knowledge of it at all. Did they exercise ordinary diligence to inform themselves, as their duty certainly required that they should? They were required to meet weekly by their own by-laws. They did not always meet semi-annually, — meeting sometimes once a year, as we have stated. They were in duty bound to cause the books of the bank to be examined at regular intervals. This they never did at all throughout their whole career, nor did they ever call for a statement of their accounts with other banks. Their vaults and their cash-drawer were emptied by illegal abstractions and insolvent loans, and they admit that they never knew it, and pleaded this as their exculpation. The stock subscribed for was not paid up, as has been stated, and yet such part as was paid up was treated as a loan, and interest paid on it, and a large part had never been paid up at the time of the suspension, and some of it has not yet been paid up. Having a bank with so small a nominal capital,

with empty vaults, and despoiled cash-drawer, they owed at the suspension of the bank, to depositors who had intrusted to them their money, \$53,063.63, on which they have been able to pay ten per cent. If these directors had any duty to perform whatever towards their depositors, the records of this case do not show its performance. They plead ignorance. One of their number was the president of the Washington and Ohio railroad in its last hours, and knew its condition, and secured himself; but the notes due the bank were allowed to sleep unprotected, unsecured, unrenewed, uncollected, and unsued on. One of their number was the president of the Alexandria Passenger Railroad Company, and knew its condition. One of their number was the brother of their defaulting debtor, Jameison, who was insolvent at the time of the loan of thousands to him without security. It is difficult to concede that they could have been ignorant of all this. But suppose they were. Their duty required that they should have looked well into all these matters; and if they have negligently trusted them to others, and loss has occurred, should it fall on them, or upon the depositors, who had trusted them, and whose trust they had accepted, and to whom they had solemnly promised such care and attention as were to be expected of good business men?

We think the record shows that these directors, and all of them, have been guilty of such negligence in the premises as makes them personally liable for the losses caused by their negligence, and we are of opinion that the circuit court of Alexandria City erred in holding them exonerated. While this is true, there is nothing in the record which shows any bad faith, or tends to show any dishonesty on the part of some of these gentlemen, who appear to have confided their duties to others, and to have been betrayed by them; but this was such negligence as will fix liability upon them, and their act in assuming this attitude of trust and confidence was voluntary, and led to the confidence which has resulted in loss.

We are of opinion to reverse the decree of the circuit court of Alexandria City appealed from, and to render such decree here as the said court ought to have rendered.

LIABILITY OF DIRECTORS OF CORPORATION FOR NEGLIGENCE. — In the note to *Beach v. Miller*, *post*, p. 000, in discussing transactions between a corporation and its directors, we took occasion to consider their relations to each other, and concluded that, while directors are often spoken of as trustees of the corporation, their true relation to it is that of its agents. The more diffi-

cult question is, What is the degree or measure of skill and care which these agents owe to the corporation? and when must they respond for damages suffered from their failure to exercise such skill and care? The adjudications upon this subject have been, in the main, in extreme cases, — cases in which the negligence of the directors had been so extreme that all liability on their part must be denied, or their liability in the particular case sustained, or cases in which the directors had acted gratuitously and under such circumstances that the stockholders could not reasonably have expected of them any considerable skill or attention. Hence, while we know that there are cases in which directors are clearly answerable for negligence and inattention, and other cases in which, in some of the states at least, they may be guilty of some degree of negligence and inattention without being held liable for the disasters resulting therefrom, we are not able to designate the precise danger line beyond which negligence, inattention, and incapacity cannot safely go.

Whatever duty directors owe is owed primarily to the corporation; and for damages resulting from a failure to perform such duties, they are answerable, if at all, to the corporation. Any action against them ought to be in the name of the corporation, as long as it is possible for the parties injured to obtain redress by action in that name. If, however, the corporation has become insolvent, and a receiver of its assets has been appointed, its cause of action against its negligent managers and directors passes to him, and he may successfully prosecute any action which, but for his appointment, could have been maintained by the corporation. Where the corporation is still under the control of the negligent directors, or of others who sympathize with them, and will not prosecute any action against them, doubtless the stockholders or creditors who have suffered injury may sustain actions in their own names for redress: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212.

There are cases which almost justify the conclusion that when negligent, inattentive, and unskillful directors allow a corporation to be wrecked, and its capital lost or substantially impaired by their failure to observe ordinary precautions for its safety, the stockholders who elected such directors and suffered them to continue in control, were themselves guilty of a species of contributory negligence, which estops them from complaining, and that this is especially true when the directors served without compensation, and, with the knowledge of the stockholders, gave the substantial management into the hands of a salaried officer of good business and moral repute, through whose fraudulent acts great losses were entailed: *Brannan v. Loving*, 82 Ky. 370; *Dunn's Adm'r v. Kyle's Ex'r*, 14 Bush, 134; *Savings Bank v. Caperton*, 87 Ky. 306; 12 Am. St. Rep. 488.

In the two cases last cited, it appeared that the directors of the corporations had selected a cashier of good repute, whom they had no reason to suspect of wrong-doing, and had committed to him the entire management of the business; that they neither examined his books or accounts, nor caused them to be examined, for a number of years, during which he was engaged in a continuous system of embezzlement and false entries, all of which might have readily been detected by such examination; and yet this inattention of the directors was adjudged not to constitute negligence sufficient to warrant their being held answerable for its consequences. The rule apparently deducible from these decisions is, that directors will not be held answerable for losses resulting from their inattention to the duties confided to them, unless, from all the circumstances, the court reaches the conclusion that such inattention was willful or fraudulent. In other words, it is only bad faith or gross negligence for which they are answerable, and their acceptance of their

offices is not an engagement on their part that they possess or will exercise any special skill or care.

In *Spring's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684, it did not appear that there had been any fraud or embezzlement on the part of any of the officers of the corporation. There had, however, been some mismanagement by the directors, through which losses had resulted, but they at all times acted under advice of counsel, and we have no fault to find with the decision of the trial court exonerating them from liability, nor that of the appellate court in affirming the judgment of exoneration. The opinion of the latter court, however, went beyond the necessities of the case into the general consideration of the liabilities of directors, and in so doing employed the following language: "It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries, — persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to employ ordinary skill and diligence, but no more. Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill. Ought they to be held responsible for mistakes of judgment, or want of skill and knowledge? They have been requested by their co-stockholders to take their positions, and they have given their services without compensation. We are dealing now with their responsibility to stockholders, not to outside parties, — creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or when such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say, by any means, that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentleman of character and responsibility would be found willing to accept such places."

There is a manifest distinction between negligence and inattention and mere mistakes resulting from errors of judgment, or even from ignorance or mistake of law, though the law in the question may be a part of the charter of the corporation. The authorities generally concur in exonerating trustees from liability for mistakes and errors of judgment committed in good faith while in the performance of their duties, unless such mistakes arise from ignorance of facts of which they could not have been ignorant had they exercised ordinary care in discharging the functions of their office: *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624; *Neal v. Hill*, 16 Cal. 151; *Godbold v. Branch Bank*, 11 Ala. 191; 46 Am. Dec. 211; *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Percy v. Millaudon*, 8 Martin, N. S., 68. Hence it

has been decided that a director who clearly acted in good faith was not liable for making a loan for a greater amount than the law allowed to be advanced on the security taken: *Williams v. McDonald*, 37 N. J. Eq. 409. It is obvious that the general application of this principle is fraught with great danger, and that to exonerate a director from liability for an act prohibited by the law prescribing the duties of this office is equivalent to the annulment of the law; for that which may be disregarded with impunity, for all substantial purposes, does not exist at all.

There is no doubt that trustees are liable for gross negligence and inattention to their duties: *Williams v. Halliard*, 38 N. J. Eq. 373; *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212; and in some of the states, as we have shown, they are not answerable for any less degree of negligence. Different courts, however, attach different meanings to the words "gross negligence," as used in this connection. Some of them intend to signify no more by these terms than want of that care and attention which men of common prudence ordinarily give to their affairs, while others understand the same words as implying that degree of inattention and want of care indicative either of willful recklessness and disregard of consequences, or intent to defraud or to permit others to defraud.

It is the common course of business, of which courts ought to take judicial notice, that when many corporations are formed, the persons selected and whose names are published as directors are those who have acquired reputations as men of business capacity and integrity, and that this is done to inspire confidence in the corporation, by inducing the belief that these directors will give to the management of its business the same skill and integrity which have characterized their conduct of their personal affairs. The individuals who are thus held out to the world as managers of a corporation should also be deemed to have notice of the purpose for which their names are used; and when their use has generated confidence, and induced stockholders and creditors to invest their funds, or to give credit to the corporation, the directors should not be permitted to escape liability by establishing that they did not in fact assume the control of the corporation, nor keep themselves informed respecting its affairs, and that all losses and speculations were due to their having selected a cashier, president, or other manager, in whom they imposed so unquestioning a confidence that they never made any inquiry as to what he did with the property of the corporation.

From their quasi public position, and the magnitude of the interests committed to their care, there would be no impropriety in exacting of directors a higher degree of prudence and care than that which is required of the agents of private persons. This, however, has not been done in any instance, so far as we are aware. The furthest that any of the cases go is to require of directors substantially the same degree of attention, prudence, and skill that would be expected if they had agreed to perform duties of like nature for private persons. Under the statutes controlling them and the corporation of which they are officers, their duties are either prescribed in precise terms, or are implied from the powers given them, and from the objects which the corporation is permitted or required to pursue. Their acceptance of office is an implied engagement on their part that they will exercise these powers and perform these duties to the best of their skill and judgment, and with at least ordinary care. They are therefore, in the best-considered cases, and by a preponderance of the authorities on the subject, liable not only for gross negligence, but also for all faults which are contrary to the care required of them, and they must answer for the omission of that care which every man

of common prudence takes of his own concerns: *Scott v. Depeyster*, 1 Edw. Ch. 547; *Bank of M. R. v. Hill*, 56 Me. 385; 96 Am. Dec. 470; and for waste or loss of the corporate property by the doing of acts prohibited by its charter, as by the loaning of money without security, in cases where the charter commands that security be taken: *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Williams v. McKay*, 40 N. J. Eq. 149; 53 Am. Rep. 775; or for engaging in gambling speculations in stocks unauthorized by the charter, and carried on to subserve their own interests and purposes: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212.

Whether a given state of facts constitutes negligence or not is commonly a question to be determined by a jury, or by a court exercising the functions of a jury. Hence it is difficult, and in many cases impossible, to decide in advance, or to formulate tests for deciding as a matter of law, whether directors have been guilty of that degree of negligence which will render them liable. In some instances the salary paid them, taken in connection with other circumstances, shows that the corporation was entitled to all or a greater portion of their time and attention, while in others it is clear that they have not undertaken, nor been understood as undertaking, to give to the affairs of the corporation any more than occasional attention, consisting chiefly of attendance at meetings of the board of directors, and investigating and voting upon such matters as are there presented for their action. In the latter class of cases, directors may doubtless, without rendering themselves liable, be ignorant of many matters affecting the corporate interests, of which directors of the other class could remain in ignorance only by a failure to discharge with ordinary fidelity and care the duties of their office. We do not wish to be understood as implying that directors may, by tacit understanding among themselves, give clearly inadequate attention to the business of the corporation, and then escape liability for the results of their inattention, but merely that the character and magnitude of the business and affairs of one corporation may be such that no man has any right to accept the office of director thereof without he possesses some capacity for the conduct of such business, and is willing to give to it that time and attention which it reasonably requires, while the business and character of another corporation may be such that a director therein ought not to be and is not expected to give it constant attention. But, taking into consideration the character and business of the corporation, the better rule is, that every director owes to it reasonable capacity, scrupulous good faith, and the exercise of his best judgment: *Vance v. Phoenix Ins. Co.*, 4 Lea, 385. He must not regard himself as a mere figure-head: *Shea v. Mabry*, 1 Lea, 319; but must, to avoid liability for negligence, attend to the duties required of him by law or the charter of the corporation, and in so doing employ at least ordinary care and prudence: *Williams v. McKay*, 40 N. J. Eq. 189; 53 Am. Rep. 775; *Delano v. Case*, 17 Brad. App. 531; 121 Ill. 247; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Corbett v. Woodward*, 5 Saw. 416. "The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and *cestui que trust*. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits, and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the

trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them, — the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence; and it is a gross breach of duty — *crassa negligentia* — not to bestow them": *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546.

Directors have therefore no right to commit the management of the affairs of a corporation to a cashier, president, or other officer, or to a committee of their own number, and thereafter take no steps to keep themselves informed of what is being done with the corporate assets, and the property of depositors and others confided to its care; and if they do so, and money or other property is lost through speculation, misconduct, or reckless extravagance, which reasonable care and attention on their part would have prevented, they are answerable: *Williams v. McKay*, 40 N. J. Eq. 149; 53 Am. Rep. 775; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Bank v. Bossieuz*, 4 Hughes, 387; 3 Fed. Rep. 817. And, as a general rule, a director cannot shield himself from liability because of his want of knowledge of wrong-doing, if his ignorance thereof is only consistent with his failure to give ordinary care and attention to the duties of his trust: *Delano v. Case*, 121 Ill. 247; 17 Brad. App. 531; *Corbett v. Woodward*, 5 Saw. 416; *Bank of M. R. v. Hill*, 56 Me. 385; 96 Am. Dec. 470. Therefore if moneys have for a long time been loaned without security, or there has been a series of illegal loans or other unlawful transactions, the directors, for the purpose of determining their liability therefor, must be conclusively presumed to have known thereof: *Williams v. McKay*, 40 N. J. Eq. 149; 53 Am. Rep. 775; *Land Credit Co. v. Lord Fermory*, L. R. 5 Ch. 763, 770. So if in order to establish a claim against a corporation, or to enforce an alleged right, it is necessary for a director to show that he was ignorant of the existence of facts which it was his duty to know, he cannot prevail. In other words, his non-performance of his duties to the corporation, and his consequent ignorance, cannot entitle him, as against it, to a right to which he could not have been entitled had these duties been properly performed: *German Savings Bank v. Wulfschlaeger*, 19 Kan. 60; *Merchants' Bank v. Rudolf*, 5 Neb. 527.

Even in states where the rule prevails that directors are not liable, except for gross negligence, they must respond in damages to one who had made a special deposit of bonds with the corporation, which its officers afterwards sold and converted to its use, because, by an honest administration of the

affairs of the corporation, and the exercise of slight diligence, the directors might have prevented the unlawful sale and conversion of the bonds by the other officers: *United Society v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731.

While there are *dicta*, and perhaps decisions, to the effect that directors, acting in good faith, and not seeking to obtain any special advantage for themselves, are not liable for mistakes, or ignorance of law, or even of the provisions and prohibitions of the charter of the corporation, we regard these expressions of opinion as unsound. There may probably be special circumstances under which a director will not be required to respond in damages, though he has disobeyed the mandates of the charter to the detriment of the corporation. Such cases, if they arise, must be regarded rather as constituting exceptions to the general rule than as justifying the assertion that a director may with impunity willfully disregard either the law or the corporate charter, or stupidly or carelessly be in ignorance of either. Therefore directors who loan moneys without exacting security therefor, when such security is required by the general law or the charter of the corporation, or who accept securities in payment for the capital stock when such payment is required to be made in money, or who otherwise disregard the commands of the charter or the general law, whereby the money or property of the corporation is lost or wasted, are, by the best-considered decisions, deemed answerable for the damages which their misconduct has occasioned: *Citizens' Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *Williams v. McKay*, 40 N. J. Eq. 149; 53 Am. Rep. 775; *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Moses v. Occochee Bank*, 1 Lea, 396.

PHENIX INSURANCE CO. v. FIRST NATIONAL BANK.

(85 VIRGINIA, 708.)

INSURER'S RIGHT TO SUBROGATION. — Insurer who has paid a loss to a mortgagee is not entitled to be subrogated to the mortgage debt while any part of it remains unpaid. In other words, the insurer is not entitled to subrogation, if any part of the debt is unpaid, unless he tenders to the mortgagee the balance due.

SUIT by an insurance company to be subrogated to certain securities held by the defendant bank. A policy of insurance had been issued by the insurance company, but the loss, if any, had been made payable to the bank. Afterwards, a fire occurred resulting in a loss aggregating seven hundred dollars, which was paid by the insurance company, and the policy surrendered to it. After the insurance company paid the loss, it demanded of the bank an amount in bonds secured by the mortgage equivalent to the losses paid. The trial court denied the right of the insurance company to subrogation, on the ground that there was due the bank, in the aggregate, on bonds secured by the mortgage, \$7,187, of which the sum of \$700 only had been paid through the payment by the insurance company of the loss suffered by the fire.

E. S. Conrad, for the appellants.

G. E. Sipe, for the appellee.

RICHARDSON, J. We have had no hesitancy in coming to the conclusion that the decree complained of is without error, either on principle or authority. The case involves only one single question: Does an insurer, who has paid a loss to a mortgagee, that covers only a part of the mortgage debt, acquire as against the mortgagee a right to demand and take from the mortgagee the evidences of the debt secured to the amount of the loss paid by the insurer, whether the mortgagee be able or not to obtain satisfaction of his debt from the remaining evidences of the debt? Or in other words, must not the creditor's debt be paid in full before the insurer can take from him by subrogation any part of that debt?

The doctrine which is applicable to this case, and which squarely meets this question, is clearly laid down by Mr. Justice Strong in pronouncing the opinion of the supreme court of the United States in *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 501, where the learned judge says: "No doubt can exist that the mortgagor and the mortgagee may each separately insure in his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance on his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatever therein.

On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances." And in *Royal Ins. Co. v. Stinson*, 103 U. S. 25, Mr. Justice Bradley concludes the opinion with the remark: "After a loss has occurred, and the insurance has been paid sufficient to discharge the debt, the insurer may be subrogated to the rights of the creditor against the debtor."

In a note to *King v. State M. Fire Ins. Co.*, 54 Am. Dec. 696, the learned annotator says: "The doctrine of the principal case, that the insurer is not entitled to demand subrogation under a policy which does not expressly provide for it, is the established law in Massachusetts, . . . and that doctrine seems to be adopted in May on Insurance, sec. 456, Wood on Fire Insurance, 782, and in later editions of Mr. Phillips's work: 2 Phillips on Insurance, sec. 1712. But it must be admitted that the decided preponderance of authority is against this doctrine, and in favor of the insurer's right of subrogation and assignment in such cases upon paying the loss, and if necessary, the balance due on the mortgage"; citing *Flanders on Insurance*, 400; *Carpenter v. Providence W. Ins. Co.*, 16 Pet. 495, and numerous other authorities.

The authorities demonstrate the correctness of the decree appealed from, and we are therefore of opinion that the same must be affirmed.

INSURANCE — SUBROGATION — MORTGAGE. — Where the assured has an executory contract for sale of mortgaged premises at the time of the loss, the insurance company, upon paying the loss, cannot be subrogated to the rights of the insured, *pro tanto*, under the contract of sale: *Washington F. Ins. Co. v. Kelly*, 32 Md. 421; 3 Am. Rep. 149. Compare note to *King v. State etc. Ins. Co.*, 54 Am. Dec. 696, 697.

SUBROGATION — PAYMENT OF DEBT. — Before subrogation can be decreed, payment to the creditor must have been made: *Forest Oil Co.'s Appeal*, 118 Pa. St. 138; 4 Am. St. Rep. 584; *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136.

BERNARD v. RICHMOND, FREDERICKSBURG, AND POTOMAC RAILROAD COMPANY.

[86 VIRGINIA, 792.]

JURY TRIAL — INSTRUCTIONS, ERRORS IN, WHEN IMMATERIAL. — A judgment will not be reversed for error in giving or in refusing to give instructions, if the verdict is manifestly right.

RAILROADS, LIABILITY OF, FOR FIRE. — A railroad corporation is not answerable for damages resulting from fire, started at a point not on its roadway, by sparks emitted from the chimney of one of its locomotives, if the corporation exercised its rights in a lawful manner, and with reasonable care and skill.

RAILWAYS — PRESUMPTION OF NEGLIGENCE FROM A FIRE STARTED. — From the fact that a fire is started by sparks from the chimney of a locomotive, no presumption arises that the corporation operating such locomotive was guilty of negligence.

ACTION against a railway company to recover damages suffered from a fire started by sparks emitted from a locomotive belonging to and operated by the defendant. The verdict and judgment were in favor of the defendant.

J. G. Mason, for the plaintiff in error.

Marye and Fitzhugh, for the defendant in error.

FAUNTLEROY, J. On the twenty-second day of April, 1885, during a severe drought, which had long prevailed, the woods of the plaintiff, Bernard, were set on fire by reason, as alleged, of sparks escaping from an engine of a passing train over the road of defendant company, and they were thereby greatly injured. The plaintiff, to recover damages for the injury thus done, brought this action of trespass on the case. The defendant's plea was not guilty. After all the evidence of the plaintiff and the defendant had been given to the jury, the plaintiff offered a series of instructions, and the defendant also offered certain instructions; but the court refused to give the instructions prayed for by both the plaintiff and the defendant, and gave, in lieu thereof, instructions of its own. Whereupon the plaintiff excepted to the action of the court in refusing to give the instructions asked for by him, and in giving the instructions which the court did give of its own.

Upon the trial of the case, the jury, having fully heard the evidence and the instructions given by the court, returned a verdict for the defendant, upon which the court entered up judgment, after refusing the motion of the plaintiff to set the verdict aside and grant a new trial on the ground that the verdict was against the evidence.

It is not necessary to recite here and pass upon the instructions which were refused by the court, nor those which were given by the court; because, from the evidence certified in this record, even that of the exceptor's own witnesses, if under the rule of this court it could be considered, the verdict, as said by Lewis, P., in delivering the opinion of this court in the case of *Baltimore etc. R. R. Co. v. McKenzie*, 81 Va. 71, "independent of this [the] instruction, could not properly have been otherwise than for the defendant in this case, and the plaintiff, therefore, in any view, has not been prejudiced"; citing *Danville Bank v. Waddill*, 27 Gratt. 448; *Snouffer's Adm'r v. Hansbrough*, 79 Va. 166; *Chicago, Milwaukee, & St. Paul R. R. Co. v. Ross*, 112 U. S. 377.

In the case of *Payne v. Grant*, 81 Va. 164, Hinton, J., delivering the opinion of this court, says: "But we may also add, that if there were any error in the giving, or refusal to give, the instructions referred to in certain of these bills of exceptions, or in the admission or refusal to admit certain evidence mentioned in the other bills of exceptions, that as the verdict is manifestly right, the defendant could not have been prejudiced thereby; and therefore such error, if any was committed, can afford no ground for a reversal of the judgment complained of"; citing *Brighthope R'y Co. v. Rogers*, 76 Va. 443; *Danville Bank v. Waddill*, 27 Gratt. 448; *Harman v. City of Lynchburg*, 33 Gratt. 43; *Kincheloe v. Tracewells*, 11 Gratt. 589; *Colvin v. Menefee*, 11 Gratt. 87.

The evidence in the record, as set forth in the second bill of exceptions, not only fails utterly to prove negligence upon the defendant company, but it positively disproves the charge; and the only witnesses of the plaintiff who witnessed the occurrence of the fire, and who testified as to the place or exact beginning of the ignition, are not in conflict with the testimony of defendant, which proves, distinctly and explicitly, that the fire did not catch or start upon the company's right of way, but, positively, that it began upon the lands adjoining, of Mr. Pratt, in a bunch or cluster of cedar bushes; and these said two eyesight witnesses of the plaintiff concur in this fact.

Major E. D. T. Myers testified that he was, on the 22d of April, 1885, and still is, the general superintendent of the defendant company's road and management; that the engine was a new engine, built but a few months before the fire by the Baldwin Locomotive Works of Philadelphia, the finest locomotive-works in North America; that he is an expert, and thoroughly inspected the engine, and every part of its equipment, with all the most modern and approved appliances in general use, and that everything was first-class and in perfect order; that he makes it a special object of frequent and habitual inspection, — trips over the road to see that the express and stringent rule of the company that its roadway shall be kept entirely free from any trash, grass, or other inflammable matter is carried out; and that this rule of the company has been strictly enforced for the last five years, and that the roadway of the defendant company was clear and free from inflammable matter on the day the fire occurred. He testified that the spark-arrester upon the engine was of the best in use to prevent the escape of sparks, and was in perfect

order; but that no spark-arrester has ever been invented which will or can entirely prevent the emission of sparks; and that, in his judgment, none can be which would not render the engine useless by stopping its draught.

Mr. Eubank testified that he had been the section-master of that portion of the road for seventeen years; that in thirty minutes after he saw the smoke of the fire he was on the spot with his gang of hands, and endeavored to arrest the fire, which, with a strong wind, had made considerable headway; that he made a careful examination to ascertain where the fire started, and found that it had not started on the company's right of way, which was entirely free from any inflammable matter, and that he was assured, with certainty, that the fire started outside of the right of way.

Mr. Mordecai testified that he is a farmer, living in Henrico County, and was occasionally employed by the company to investigate the origin and damages of fires along its line; that he was sent by Major Myers to the locality of this fire, and to examine and report whether the fire had started on the defendant company's right of way, which was forty feet each way from the center of the track, and that he had no difficulty in ascertaining and in stating to the jury that the fire had started outside and beyond the company's right of way, and had burned back to and along its boundary some ten yards, and was stopped there by the total absence of inflammable matter on the right of way.

All the witnesses testified that there was prevailing a very high wind, and Major Myers testified that, when the wind was blowing, sparks would fly a much greater distance than twenty or even sixty feet from the track.

Mr. Faulkner testified that he was engineer upon the engine No. 17 on the 22d of April, 1885; that he had been in the employ of the company for a number of years, and that he regarded himself as an expert and skillful engineer; that the engine and apparatus to prevent the escape of fire were, on the day and occasion of the fire, in good order, and that the engine was operated in a judicious manner.

Pierce on Railroads, page 431, says: "A railroad company, being authorized by law to work its engines in the usual and proper way, and, when necessary, in the exercise of rights, to send forth particles of fire from them, is not liable for injuries caused thereby to private property, provided it exercises its rights in a lawful manner, and with reasonable care and skill.

. . . . As negligence is the gist of the action against the company for injuries received from it while exercising its lawful right to conduct its trains, the burden of proof is on the plaintiff to prove the negligence. The fact of injury suffered by the plaintiff in consequence of the exercise of a right by the defendant does not raise the presumption of negligence, except in some particular cases, as in actions against innkeepers and common carriers, which are made exceptions to the general rule, on grounds of public policy. Hence the setting on fire of grass, fences, or building on the railroad by particles of fire, which are proved to have issued from the company's engines, does not, of itself, justify the inference of negligence. There are, however, authorities which hold that the fact that the company caused the injury by fire raises the presumption of its negligence; and that, upon this fact appearing, the burden of proof is on the company to disprove negligence, by showing that it used the best mechanical contrivances in known practical use to prevent the escape of fire from its engines, and that it managed such engines with due care and skill."

Mr. Redfield, in his work on the law of railways, volume 1, page 476, says: "But in this country, it must be confessed, the rule of the liability of railways for damage done by fire communicated by their engines is more favorable to the companies than in England. It seems to have been assumed in this country that the business of railways being lawful, no presumption of negligence arises from the fact of fire being communicated by their engines": See *Norfolk etc. R. R. Co. v. Ferguson*, 79 Va. 248, 249; *Sheeler's Adm'r v. Chesapeake etc. R. R. Co.*, 81 Va. 199; 59 Am. Rep. 654.

The defendant company had the right to run its engines, propelled by steam generated by fire, on its railway track; and it is not liable for damage that accrued in the exercise of its legal rights, unless such damage was caused by the negligence of the company.

In the case under review, no such negligence is proved against the defendant company; but, on the contrary, it is fully disproved by the evidence certified.

We are of opinion to affirm the judgment complained of.

RAILROAD COMPANIES — NEGLIGENCE — LIABILITY FOR FIRES. — Railroad companies are not only required to exercise a high degree of care to prevent the kindling of fires by sparks escaping from locomotives, but must use ordinary care in extinguishing fires thus started: *Missouri P. R'y Co. v. Platner*,

73 Tex. 117; 15 Am. St. Rep. 771, and note. Compare note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70-79.

RAILROAD COMPANIES — LIABILITY FOR FIRES — PRESUMPTION OF NEGLIGENCE. — Where damage occurs from fires started by sparks escaping from locomotives, negligence is presumed upon the part of the railroad company: Note to *Laird v. Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564; note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71, 72.

VIRGINIA FIRE AND MARINE INS. CO. v. COTTRELL.

[85 VIRGINIA, 857.]

JUDICIAL SALES. — A PROCEEDING TO SET ASIDE OR RESCIND THE CONFIRMATION OF A JUDICIAL SALE cannot be by summary rule to show cause, but should be by formal petition filed in the case setting forth the grounds upon which the application is based.

JUDICIAL SALES. — BEFORE THE CONFIRMATION OF A JUDICIAL SALE the proceeding is *in fieri*, and the bidder is not a purchaser, but after such confirmation the contract is complete. The bidder thereby becomes a purchaser, and, as such, the owner of the equitable title subject to a lien upon the property for the purchase-money, and may be compelled by process of the court to comply with the contract.

JUDICIAL SALES. — AFTER CONFIRMATION OF A JUDICIAL SALE, it cannot be rescinded except upon some special ground, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person connected with the sale, which has worked an injustice to the party complaining.

JUDICIAL SALE WILL NOT BE VACATED AFTER CONFIRMATION BECAUSE A VALUABLE MINE HAS BEEN DISCOVERED adjacent to the premises since the sale, whereby their market value is increased, though the purchase-money has not been paid, if there was no fraud in concealing the existence of the mine before the order of confirmation was entered.

APPEAL from an order denying an application to set aside or rescind the confirmation of a partition sale. In the advertisement of sale, the land was described as "situate in the coal basin of Virginia, said to be rich in minerals," and as adjoining "the Carbon Hill mines, which are now in operation." The sale was made at public auction, May 31, 1887. Thereafter the commissioners who made the sale reported it to the court, and stated in their report that though the purchaser had not yet complied with the terms of sale, their counsel stated that they would be fully complied with and that the sale was an excellent one and ought to be confirmed. July 23, 1887, the sale was confirmed, and the order of confirmation provided that if the purchaser failed to comply with the terms of the sale within twenty days from the date of such order, a rule should be issued against it, returnable at the first day of next

term, requiring it to appear and show cause why the land should not be sold at its risk. The terms of sale were not complied with within the time designated, and the rule was issued accordingly. No action was taken under this rule, but on the return day thereof the counsel of the purchaser appeared in court and announced his readiness to answer. November 29, 1887, the purchaser tendered to the commissioners the cash payment required by the terms of the sale, together with the amount of the first deferred payment, and its note for the second and last payment. This tender was not accepted. November 30, 1887, a rule was issued against the purchaser, requiring it to appear and show cause why the sale should not be rescinded. A written application in the nature of a petition was also filed, asking that the land be again exposed to sale, and showing, as grounds for the application, that, since the confirmation, a valuable vein of coke has been discovered on a tract adjacent to that sold, and the applicant believed that this discovery led to the application of the purchaser to be allowed to complete his purchase. The court refused to rescind the order of confirmation, or direct a resale, and permitted the purchaser to complete his purchase.

W. W. and Bev. T. Crump, for the appellant.

Guy and Gilliam, for the appellees.

LEWIS, P. One of the modes by which a purchaser at a judicial sale may be compelled to complete his purchase is by a rule to show cause why the property should not be resold at his risk; and in such a case, when a resale is ordered, the former sale is not set aside, but the property is sold as the property of the purchaser. If it brings more than the debt, he is entitled to the surplus; if it brings less, he is held responsible for the deficiency: *Clarkson v. Read*, 15 Gratt. 288. But a proceeding to rescind a sale which has been absolutely confirmed ought to be not less formal than by a petition filed in the cause, setting forth distinctly the grounds upon which the application is based, in order that the purchaser or other adverse parties to the proceeding may see clearly what they have to meet. A summary rule to show cause is not sufficient.

In the present case, however, according to the liberal practice which prevails with us in courts of equity, the written application, as it is termed in the record, which was filed by the plaintiffs in the court below, praying that the property be

again offered for sale, may be treated as a petition, and we will therefore consider the case upon its merits.

And, first, it is to be observed that the principles which apply to a case like the present are very different from those which govern in applications to open the bidding before confirmation. Until the sale has been confirmed the proceeding is *in fieri*; the bidder is not considered as a purchaser, and he is therefore not liable for loss to the property, by fire or otherwise, in the *interim*, nor is he compellable before confirmation to complete his purchase. But as soon as the sale is absolutely confirmed, then the contract becomes complete; the bidder, by the acceptance of his bid, becomes a purchaser, — that is to say, the owner of the equitable title in the lien on the property for the unpaid purchase-money, — and he may be compelled by the process of the court to comply with his contract: 2 Daniell's Chancery Practice, 5th ed., 1275; *Hurt v. Jones*, 75 Va. 341; *Blossom v. Milwaukee etc. R. R. Co.*, 3 Wall. 196.

It is by no means, therefore, a matter of discretion with the court to rescind a sale which it has once confirmed, nor is the sale to be rescinded for mere inadequacy of price, or for an increase of price alone; but some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person connected with the sale, which has worked injustice to the party complaining. After confirmation, the purchaser at a judicial sale is as much entitled to the benefit of his purchase as a purchaser *in pais*, and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. There is no principle upon which any distinction between the two classes of cases can be drawn, and if there be anything in the opinion of the court in *Merchants' Bank v. Campbell*, 75 Va. 455, which can be construed as holding a contrary doctrine, the proposition has been overruled by subsequent decisions.

In *Watson v. Birch*, 2 Ves. Jr. 51, Lord Commissioner Ashurst observed that biddings are not to be opened after confirmation of the report, unless under particular circumstances; that increase of price alone is not sufficient, but that if fraud appears that suspends the operation of the general rule, though he did not mean to say that fraud was the only exception.

In *Morice v. Bishop of Durham*, 11 Ves. 57, Lord Eldon is reported as saying that the only case in which the biddings can be opened after confirmation of the report is, where there

is some fraud or misconduct of the purchaser, or fraudulent negligence in another person, as the agent, of which it is against conscience that the purchaser should take advantage. And in *White v. Wilson*, 14 Ves. 151, he said that surprise generated by the conduct of the purchaser is good ground for setting aside a sale after it has been confirmed, but where there is no fraud or unfairness the purchaser is entitled to the benefit of his purchase, and that, in his opinion, a more mischievous thing could not be done to suitors than to relax further the binding nature of contracts in the master's office.

We need not, however, look beyond the decisions of this court for authority upon this subject. In *Berlin v. Melhorn*, 75 Va. 639, a sale which had been confirmed was summarily set aside at the same term, upon the offer of an advance bid, without any reason for so doing being assigned. This court, upon appeal, reversed the decree, and the ground upon which it proceeded was thus stated by Judge Burks: "We think," he said, "it may be safely laid down, as a general rule, deducible from the authorities, that after a judicial sale has been absolutely confirmed by the court which ordered it, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give like relief if the sale had been made by the parties in interest instead of by the court. But where the objection," he added, "is to the confirmation, the rule is more liberal."

This rule, which is an eminently just and salutary one, has been repeatedly recognized by this court, and public policy, which looks to the stability of judicial sales, requires that it be adhered to: *Langyher v. Patterson and Bash*, 77 Va. 470; *Coles v. Coles*, 83 Va. 525; *Todd v. Gallego Mills*, 84 Va. 586.

In the light of these principles, it is very clear that the decree complained of must be affirmed. The sale which was sought to be set aside was not confirmed conditionally, as the appellant contends it was, but absolutely. The unequivocal terms of the decree leave no room for doubt upon this point. And unless there was *mala fides* on the part of the purchaser, the fact that the terms of sale had not been complied with when the report was confirmed does not affect the case. The equitable title passes to the purchaser at a judicial sale, not by virtue of his compliance with the terms of sale, but by the confirmation of the sale by the court; and while it is usual and proper to require compliance with the terms of sale before the report is acted upon, yet if this is not required, and the

sale is confirmed, the rights of the purchaser are the same as if the terms had been complied with, provided his conduct has been fair, and not to the prejudice of any other party. And so, reciprocally, he may be compelled to complete his purchase as fully in the one case as in the other.

It is contended, however, that the purchaser in the present case has not dealt fairly with the court; that its bid was made with the sinister purpose of making compliance with its contract contingent upon the result of certain experiments to be made on its own land adjoining the property in question, and therefore that the sale ought to be rescinded. But this position is not supported by the record. Those operations were commenced and publicly conducted before the sale was made. Indeed, the fact was published to the world, in the printed advertisements of sale, as one of the inducements to the purchase of the land, and it is not unreasonable to suppose that it favorably affected the sale to the advantage of the appellant. At all events, the sale was reported as an excellent one, and promptly confirmed, without any exception having been taken to the report.

Moreover, fraud or misconduct, when relied on as a ground for rescinding a contract, must not only be clearly proved, but it must be distinctly charged in the pleadings. And if not so charged, evidence to prove it is irrelevant, and ought to be suppressed as improperly taken, no matter how strong a case it may show: *Thompson v. Jackson*, 3 Rand. 504; 15 Am. Dec. 721; *Southall v. Farish*, 85 Va. 403, and cases cited.

The application of this rule is decisive here. The petition, as we will call it, which was filed by the plaintiffs in the court below, merely alleges the fact of the discovery of a valuable vein of coke by the purchaser on its own land since the confirmation of the sale, and that the plaintiffs believed that, in consequence of that discovery, an application would be made by the purchaser to the court to be allowed to complete its purchase. But this, at most, is only a vague and inferential charge, which falls far short of the requirements of the rule above mentioned; and, besides, we have been unable to discover any evidence in the record upon which fraud or bad faith can be imputed to the purchaser. Fraud, even when distinctly charged, must be clearly proved: *Hickman's Ex'r v. Trout*, 83 Va. 478. "If the fraud is not strictly and clearly proved as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief

can be had." *Hord's Adm'r v. Colbert*, 28 Gratt. 49; *Mathews v. Crockett*, 82 Va. 394; *Houghton v. Graybill*, 82 Va. 573.

Nor does it appear that the purchaser was not able to perform its contract when the sale was confirmed, and as no personal security was required by the terms of sale, no injustice is shown to have been done by the confirmation of the sale before the terms were complied with; for had they been previously complied with, the security would have been substantially the same as it is. It is evident the sale was considered, at the time, a good one by the parties in interest, and that they were not only willing, but anxious it should be confirmed, although the report expressly stated that the terms had not been complied with, but that the counsel for the purchaser had assured the commissioners they would be. The value of the property, however, has since increased, and the sale is now sought to be rescinded. But we are constrained to say that we perceive no more reason, under the circumstances of the case, for rescinding the sale than there would be to discharge the purchaser from its contract if the result of the experiments above mentioned had been the opposite of what they were.

The appellant lays much stress on the delay of the purchaser in complying with the terms of sale after confirmation of the report; but that is fairly explained, we think, by the record. On the return day of the rule to show cause why the land should not be resold, the purchaser, by counsel, appeared in court and announced its readiness to answer, but no action upon the rule was taken. Why the matter was dropped does not appear, but the inference is, that the delinquency of the purchaser up to that time was condoned. And before the second rule was gotten out, the whole of the first deferred payment was tendered to the commissioners (the day before it fell due), together with the cash payment, and accrued interest thereon, and also the purchaser's note for the second and last deferred payment. The tender, however, was not accepted, and without knowledge of the fact that it had been made, the court ordered the rule to be issued.

To this rule the purchaser filed its answer, renewing the tender it had made to the commissioners, and averring that it would have complied with its contract at any time after the sale if it had been required to do so. The court thereupon accepted the tender and discharged the rule, and in this there was no error. In the absence of fraud or misconduct, the payment of interest on the cash payment was an equiva-

lent for the default of the purchaser, and hence no one has been injured: *Smith's Ex'r v. Proffitt*, 82 Va. 882, 849. Ordinarily, in such cases, time is not of the essence of the contract, and to justify the rescission of an executed contract, or a sale which has been confirmed, there must be some objection which goes to the substance of the contract: *Thompson v. Jackson*, 3 Rand. 504; 15 Am. Dec. 721.

It is hardly necessary to add, after what has been said, that, in our opinion, there is no analogy between the present case and *Merchants' Bank v. Campbell*, 75 Va. 455, relied on by the appellant. In that case, the purchasers, before confirmation of the sale, discovered, underneath the land for which they had bid, a cave of vast proportions and beauty, which enormously added to the value of the property. And after making the discovery, they carefully stopped up the entrance to the cave, and falsely reported that it was nothing but a mud-hole. This was a palpable fraud, as the court held, and upon that ground the sale was rescinded. We do not see how any other conclusion could have been reached; nor do we understand the court as intending to go further than to announce the doctrine as well established, both in England and America, that for fraud, misrepresentation, or injurious mistake, a sale, whether confirmed or not, will be set aside, and the property again sent into the market and resold,—a proposition in harmony with what has already been said. See also *Talley v. Starks*, 6 Gratt. 839; *Watson v. Hoy*, 28 Gratt. 698.

Decree affirmed.

JUDICIAL SALES—SETTING ASIDE.—Where sales are made by authority of the court, the contract is not regarded as consummated until confirmation, but after confirmation the sale will not be disturbed except for fraud, accident, or mistake: *Houston v. Aycock*, 5 Sneed, 406; 73 Am. Dec. 131, and note; *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582; *Hart v. Burch*, 130 Ill. 427; *Morrow v. McGregor*, 49 Ark. 67; *Todd v. Gallego etc. Mfg. Co.*, 84 Va. 586; *Freeman on Executions*, secs. 305-310.

JUDICIAL SALES—SETTING ASIDE—REMEDY.—The remedy is ordinarily by a motion to set aside the sale: *Clark v. Allen*, 87 Ala. 198; but when any distinct ground of equity intervenes, or when a motion to set aside is not a complete and adequate remedy, a court of equity will set aside the sale for sufficient cause: *Clark v. Allen*, 87 Ala. 198; *Catchings v. Harwood*, 49 Ark. 20.

NIAGARA FIRE INSURANCE COMPANY v. ELLIOTT.

[86 VIRGINIA, 962.]

INSURANCE ON ARTICLES CONTAINED IN A CERTAIN LIVERY-STABLE, such as harness and carriages, which the insurer knows are kept in constant use, and therefore often in need of repairs, remains in force while such articles are temporarily absent from the stable for the purpose of being repaired, and if they are destroyed by fire during such absence, a recovery may be had for the loss thereby sustained.

R. G. H. Kean, for the plaintiff in error.

Kirkpatrick and Blackford, and *W. M. Lile*, for the defendant in error.

HINTON, J. This is an action upon a policy of insurance to recover of the defendant company their *pro rata* share of the loss upon three vehicles which were destroyed by fire, in the city of Lynchburg, on the twenty-seventh day of February, 1887, the residue being claimed of the Fire Association of Philadelphia, a company in which the plaintiffs also held a policy. At the time of the fire, these vehicles were not in the livery and sales stable, where they were kept, except when in use, but were several hundred yards off, at a carriage repair-shop, whither they had been sent for repairs. The language of the policy is, that the said company, in consideration of the premium, "does insure Elliott and Doss to the amount of fifteen hundred dollars, on carriages, buggies, hacks, and harness, their own or sold, until removed, contained in the framed metal building and framed addition thereto, No. 916 Lynch Street, Lynchburg, Virginia, occupied as a livery and sales stable." Under this state of facts, the general, and indeed the only, question presented for decision is, whether the property destroyed was covered by the policy at the time of the burning. It is not denied that this property came within the protection of the policy as often as it was returned to the stable, but it is argued that it was the purpose of the company to indemnify the insured for any loss by fire in that building, and not elsewhere. Now, is this so? No rule is better settled than that contracts of this character must receive a fair and reasonable interpretation. To use the language of Nelson, C. J., in *Turley v. North American F. Ins. Co.*, 25 Wend. 374, "its intent and substance, as derived from the language used, should be regarded." But, says he, "there is no more reason for claiming a strict, literal compliance with its terms than in ordinary contracts. Full legal effect should always be

given to it for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form, — following words, rather than ideas.”

Now, bearing in mind the observations of Lord Mansfield in *Pelly v. Royal Exchange Assurance*, 1 Burr. 341, that the insurer, in estimating the price at which he is willing to indemnify the insured, must have under his consideration the nature of the business, and the usual course and manner of conducting it; and everything done in the usual course must have been foreseen and in contemplation at the time he engaged, and that he takes the risk upon the supposition that what is usual or necessary will be done. Should the words “contained in,” upon which the plaintiff in error rests its contention, be construed to restrict the liability of the company to the use of the property at the place specified, or should those words, when used with respect to property of the kind destroyed, be construed as merely designating the accustomed place of deposit of the property when not in use, or being used for some purpose incidental to its use? Where merchandises kept in stock, or carriages kept in a carriage-maker’s establishment for sale, are insured, there is nothing in the nature of the property to indicate that it will be removed before it is sold, and hence the insurer may be supposed to have underwritten the policy upon the idea that the property would be entitled to whatever protection the character of the building and its situation might afford, and that it should be exempt from the risks incident to temporary removals, or to the use of the property at other than the specified place of location. But where the property is of such a kind that it must be kept in constant use, and therefore of necessity be often in need of repairs, no room for such an inference can exist; and in such a case we are constrained, by every principle applicable to the construction of contracts of this kind, to hold that the words “contained in” were used to designate the usual place of deposit for the property when not in use, or while being prepared for use. As was said by Adama, J., in *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249, the words “contained in” are, in cases of this kind, synonymous with the word “kept,” and yet it would hardly be maintained that a plaintiff who had signed an application in which he had said that he kept his carriage in his barn would be deprived of the benefits of the policy merely because at the moment he obtained the policy it was standing at the door of the insurer’s office, and was

there consumed by fire. To the same effect is the great current of authority: *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 849; 22 Am. Rep. 249; *Peterson v. Mississippi Val. Ins. Co.*, 24 Iowa, 494; 95 Am. Dec. 748; *Noyes v. Northwestern etc. Ins. Co.*, 64 Wis. 415; 54 Am. Rep. 631; *Longueville v. Western Assurance Co.*, 51 Iowa, 553; 33 Am. Rep. 146; *Fitchburg R. R. Co. v. Charlestown etc. Ins. Co.*, 7 Gray, 84; *Holbrook v. St. Paul etc. Ins. Co.*, 25 Minn. 229; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400; *Lyons v. Providence W. Ins. Co.*, 14 R. I. 109; 51 Am. Rep. 364; and 1 Wood on Insurance, 115 et seq. There is no error in the judgment complained of, and it must be affirmed.

FIRE INSURANCE — CONSTRUCTION OF POLICY. — As to the meaning of the words "contained in," as used in insurance policies, see *Lyons v. Providence W. Ins. Co.*, 13 R. I. 347; 43 Am. Rep. 32, and note 34, 35; *English v. Franklin F. Ins. Co.*, 55 Mich. 373; 54 Am. Rep. 377.

INSURANCE OF MOVABLE PROPERTY, INCLUDING LIVE-STOCK, ETC., AND THE EFFECT OF REMOVAL: See note to *Peterson v. Mississippi Val. Ins. Co.*, 24 Am. Dec. 741-743.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KENDALL v. FREY.

[74 WISCONSIN, 25.]

DEPOSITION OF MUNICIPAL OFFICERS. — A COURT OF EQUITY WILL NOT UNDERTAKE TO CONTROL the judgment of the common council of a municipal corporation, and compel them to build a public hall upon a lot which they do not think is suitable or convenient for that purpose, though the municipality had previously accepted the conveyance of such lot upon the condition that such hall should be built thereon.

EQUITY POSSESSES NO POWER TO REVISE, CONTROL, OR CORRECT THE ACTION OF PUBLIC, POLITICAL, OR EXECUTIVE OFFICERS or bodies at the suit of a private person, except as incidental to the protection of some private right, or the prevention of some private wrong, and then only when the case falls within some acknowledged and well-defined head of equity jurisprudence.

MUNICIPAL CORPORATION. — ONE COMMON COUNCIL OF A CITY CANNOT BIND ITS SUBSEQUENT OFFICIALS to build a hall upon a particular lot, if the latter believe such lot is not an advantageous and suitable site for such building.

ACTION against the mayor and other officers of the city of Hartford, as well as against the city, to compel the specific performance of a contract to erect a city hall upon a lot which the plaintiffs had conveyed to the city for that purpose, and to enjoin the erection of such hall upon any other site. The conveyance from the plaintiffs to the city contained the following conditions: "The second party is to construct and maintain on said premises a city hall building of not less than two stories above basement; basement wall to be of stone, above basement of solid brick not less than one foot thick, with metal or gravel roof; and a failure of said city to maintain such building for five years at any time shall work a reversion of

said lot to said first parties." The lower court granted an injunction restraining the defendants during the pendency of the action, but afterwards dissolved such injunction, and this appeal was from the order of dissolution.

H. W. Sawyer, for the appellants.

Winkler, Flanders, Smith, Bottum, and Vilas, for the respondents.

COLE, C. J. If we rightly understand this case, the action is brought to enforce the specific performance of a contract to erect a city hall and lock-up upon a lot mentioned in the complaint, and to restrain the common council from building or attempting to erect such building upon another lot. It appears from the complaint and supporting affidavits that the officers of the city, in 1887, purchased of the firm of Kendall & Co. a lot upon which to erect a city hall and lock-up. According to the conditions in the deed of conveyance, the building to be erected was to be of a certain height and constructed of specified materials, and in case the city failed to maintain the building on the lot for five years, the title should revert to the grantors. The city accepted the conveyance, and took steps preparatory to the erection of the building. Some time subsequently the city obtained another lot, by gift or purchase, which was deemed more convenient and suitable for a public hall site, and abandoned the notion of building on the Kendall lot. It is alleged that the officers of the city threaten, or are preparing, to erect the city hall upon the new lot. Hence this action to compel them to erect the building upon the Kendall lot, and enjoin them from erecting it on any other lot.

It seems to us there are serious objections to granting the relief asked for in this suit. Mr. Justice Story says it has been a matter of some conflict of opinion how far courts of equity ought to entertain a suit for the specific performance of a covenant to build or rebuild a house of a specified form and size on particular land. In the earlier cases the jurisdiction was maintained, but in the more recent authorities the doctrine has been denied, and courts of equity have not enforced such a covenant: See 2 Story's Eq. Jur., secs. 725, 726; Fry on Specific Performance, secs. 65-76; *Beck v. Allison*, 58 N. Y. 366; 15 Am. Rep. 430; *Danforth v. Philadelphia etc. R'y Co.*, 30 N. J. Eq. 12; *Oregonian R'y Co. v. Oregon R'y etc. Co.*, 11 Saw. 33. Furthermore, there are the most cogent reasons

why the court should refuse to decree the specific performance of the agreement to build the city hall on the Kendall lot. The matter of erecting a public building which shall furnish suitable accommodations for the business and needs of the city is eminently a question for the common council to decide. In the decision of the question, the common council exercises its judgment and discretion, and determines to erect a building, we must presume, where it will best meet the general convenience and wants of the corporation. Certainly, a court of equity ought not to interfere to control or revise the discretion and judgment of the common council, if it acts honestly in the matter. How and where a public building shall be erected is necessarily a question of public policy, and involves a variety of considerations. The common council is vested by law with full authority to decide them. The court cannot wisely review their action on such a subject. It seems to us that this view is sound and rational.

It appears that the plaintiffs own other lots and valuable property adjacent to and in close proximity to the Kendall lot; and it is alleged that the construction of the city hall upon that lot would be of great benefit and advantage to the plaintiffs, and would greatly increase the value of their property, and for that reason they offered and sold to the city the lot they did for much less than its actual value, relying upon the agreement that the city hall would be built thereon. But this furnishes no sufficient ground for enforcing the specific performance of the contract to erect the city hall upon that particular lot. If the plaintiffs shall sustain any loss by reason of the breach of the contract on the part of the city, they have their legal remedy for the damages. It is much better that the plaintiffs should resort to that remedy than that a court of equity should undertake to control the judgment of a common council, and compel them to build the public hall upon the lot which they do not think is suitable or convenient for the purpose. It is by no means clear that the plaintiffs have not an adequate remedy at law for any damage which they may sustain if the city builds upon the other site. If the new site is more ample and favorable every way for the public building, it would be the plain duty of the common council to adopt and build upon it. The common council should act solely with reference to the best interests of the municipality, rather than from regard to the advantage of individual lot-owners. It was certainly not competent for the common

council of 1887 to bind the subsequent city officials to build the hall upon a particular lot, if the latter believed that such lot was not an advantageous and suitable site for such a building. The city officers should endeavor to promote the public interest, and consult only the wants of the people in making such improvements. It is further urged that the title to the new site is not perfect; but conceding that to be so, still this fact affords no ground for an injunction at the suit of the plaintiffs. "The general principle that equity possesses no power to revise, control, or correct the action of public, political, or executive officers or bodies is, of course, well understood. It never does so at the suit of a private person, except as incidental and subsidiary to the protection of some private right, or the prevention of some private wrong, and then only where the case falls within some acknowledged and well-defined head of equity jurisprudence": *Judd v. Fox Lake*, 28 Wis. 587. The common council had authority under the charter to acquire the real estate in question for the city-hall site, and if they acted prudently in the exercise of their best judgment, their discretion will not be revised or controlled by a court of equity: *Konrad v. Rogers*, 70 Wis. 492. These observations are sufficient to show that the court below properly dissolved the injunction.

The order of the circuit court is affirmed.

MUNICIPAL CORPORATIONS ARE NOT LIABLE for their acts which are legislative or judicial in their nature, involving the use of discretion: *Hitchins v. Mayor etc. of Froelburg*, 68 Md. 100; 6 Am. St. Rep. 422, and note; note to *Fournoy v. Jeffersonville*, 79 Am. Dec. 475, 476; *Stackhouse v. Lafayette*, 26 Ind. 17; 89 Am. Dec. 450, and note. Township officers are not personally liable for acts done honestly in the exercise of the discretion which the law gives them: *Yealy v. Fink*, 43 Pa. St. 212; 82 Am. Dec. 556. Compare *Amperu v. Kalamazoo*, 75 Mich. 228; 13 Am. St. Rep. 432, and note.

HAIGHT v. HALL.

[74 WISCONSIN, 182.]

CURTSEY, WHAT CONVEYANCE EXCLUDES. — HUSBAND CAN HAVE NO ESTATE AS TENANT BY CURTSEY, when the conveyance by which title is vested in his wife declares that she is "to have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to her, to her sole support and use, free from the interference and control of her said husband, or any husband, and her heirs and assigns; to her and their only proper use and benefit forever."

EJECTMENT by the plaintiffs, as children and heirs at law of Selina Haight, deceased, the first wife of Augustus Haight. Judgment was entered in favor of the defendants, and the plaintiffs appealed.

C. W. Felker, for the appellants.

Weisbrod, Harshaw, and Nevitt, for the respondents.

COLE, C. J. In 1865, Mrs. Ann M. Paige conveyed to her daughter, Selina B. Haight, by a warranty deed, the premises in controversy. The grantee was then the wife of Augustus Haight. The deed was in the usual form, except the *habendum* clause contains this language: "To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to her, the said Selina B. Haight, to her sole and separate use, free from the interference or control of her said husband, or any husband, and her heirs and assigns, to her and their only proper use and benefit forever." The sole question for consideration is, Did Augustus Haight become tenant by the curtesy in the premises on the death of his wife, the grantee in the deed? On the part of the appellants, it is insisted that, upon the death of their mother, they took the premises by descent, discharged from any estate by the curtesy, and that this is the only reasonable construction which can be given the clause of the deed above quoted. We are inclined to adopt this view of the case as correct.

It is a cardinal rule in the construction of instruments, that such a construction, if possible, should be adopted which will give some effect to all the words of the instrument and render all parts operative. Now, if the tenancy by the curtesy was not cut off by the clause of the conveyance, then it is obvious that, on the death of Mrs. Haight intestate, her husband took that estate; and the language in the deed, that the grantee shall hold the premises to her sole and separate use, free from

the interference or control of her husband, her heirs and assigns, to her and their only proper use and benefit forever, has no force whatever given to it; for, under the statute as it then and now exists, real estate conveyed to the wife during coverture became her sole and separate property, which she could hold to her sole and separate use in the same manner and with the like effect as if she were unmarried: R. S. 1858, c. 95. It is difficult for us to conceive of any other object or purpose the grantor had in restricting the grant to the grantee, and to her heirs and assigns, to her and their only proper use and benefit forever, free from all interference or control of the husband, unless the intention was to exclude the estate by the curtesy; for how could the husband take that estate if the use and enjoyment of the property were to belong to the grantee and heirs? He certainly could not acquire such an estate without depriving the heirs of the exclusive use which it is plainly manifest it was intended they should enjoy.

We cannot express our views on this point better than to quote the language of the court in *Pool v. Blakie*, 53 Ill. 495. "It seems to us the intention of the grantor is so plainly expressed in the deed as to place it beyond question or controversy. The intention is most clearly manifested to exclude the husband from any participating or interest in the estate granted. The expression is clear and distinct, that neither her present husband nor any future husband should have any estate in the land. It is true, the words 'that the husband, present or future, shall not be tenant by the curtesy,' are not used, but equivalent words are, manifesting most clearly the design and purpose of the gift that it should be placed in such a position that the creditors of her husband could not disturb her in the enjoyment of the estate. . . . This intent must be carried out by the courts, if in so doing no rule of law is violated or sound public policy disturbed." In the Illinois case the question presented was somewhat different from the one under consideration. The question there was, whether the grantee took an estate for life merely, or an estate of inheritance in fee, with power of disposal by will. But still the court had to construe a clause in a deed quite similar to the one before us. The language used, therefore, is entirely applicable to the question here. See also *Monroe v. Van Meter*, 100 Ill. 348, where a similar question was considered.

The counsel for the respondents has referred to many cases which hold that the husband's estate by the curtesy will arise

in him at the time of the death of his wife, though the limitation to her is for his sole and separate use, exclusive of any interest, interference, or control of her husband. We have examined these cases, but do not deem it necessary to comment on them, further than to add the remark, that, as we understand them, it is generally a question whether the deed or will intended to exclude the husband from the curtesy. If the evident intent of the will or deed is to exclude him from such estate in the lands devised or granted, such intention will prevail. There is often doubt from the words used in the instrument what the intention was, but if it is clear and manifest it is carried into effect. The question in *Kingsley v. Smith*, 14 Wis. 360, was whether the surviving husband was entitled to an estate as tenant by the curtesy in so much of his wife's real estate as descended to her children by him, or whether it all went to the children of a former marriage, freed from such tenancy. The court held that tenancy by the curtesy, in cases where the wife died intestate, was not abolished by chapter 95, Revised Statutes of 1858, but that the husband took an estate by the curtesy in such lands as descended to the children of the second marriage. The case is very different from the one before us.

As already indicated, we hold that the only reasonable construction of the clause in the deed is, that the grantor intended to convey the premises to her daughter, discharged from the estate of tenancy by the curtesy.

The judgment of the circuit court is reversed, and the cause is remanded to the circuit court for a new trial.

CURTESY. — As to when and under what circumstances tenancy by curtesy can exist: *Jackson v. Johnson*, 5 Cow. 74; 15 Am. Dec. 433, and particularly note 449-451. A husband has no curtesy in land conveyed to a trustee for the wife's separate use, by deed expressly excluding the husband from any control: *Cochran v. O'Hern*, 4 Watts & S. 95; 39 Am. Dec. 60. But where land was conveyed to a woman for her separate use, free from the control of her husband, with full power of disposition, in absence of words clearly expressing a different purpose, the husband was held entitled to his tenancy by curtesy: *Carter v. Dale*, 3 Lea, 710; 31 Am. Rep. 660. Curtesy is not incident to a life estate: *Spencer v. O'Neill*, 100 Mo. 49; nor can it exist where the wife's interest is merely a remainder expectant on a prior estate which did not determine during the coverture: *Todd v. Oviatt*, 58 Conn. 174.

ELLIS v. CARY.

[74 WISCONSIN, 176.]

SERVICES ARE PRESUMED TO HAVE BEEN GRATUITOUS WHEN RENDERED BY A STEP-DAUGHTER while residing in the family of her step-father, for whose benefit they were rendered, unless she can show an express promise to pay therefor.

STATUTE OF FRAUDS. — AGREEMENT TO MAKE A DEVISE OF LAND IN CONSIDERATION OF SERVICES TO BE RENDERED is within the statute of frauds, and therefore not enforceable, though the services have been performed in reliance thereon. The same rule applies when the agreement is to devise land and bequeath personalty, because the agreement being indivisible, and failing in part, the whole fails.

STATUTE OF FRAUDS — PART PERFORMANCE. — AGREEMENT TO DEVISE REAL ESTATE IN CONSIDERATION OF SERVICES TO BE PERFORMED is not taken out of the operation of the statute of frauds by the fact that the services are afterwards performed as stipulated, and the person performing them is in possession of the land at the death of the owner, where he was not put in possession under such an agreement, and such possession had no necessary reference thereto.

DEVISE, FAILURE TO MAKE AS AGREED UPON. — QUANTUM MERUIT MAY BE MAINTAINED FOR SERVICES RENDERED TO A STEP-FATHER by his step-daughter, in consideration of an agreement that the former would devise and bequeath his real and personal property to the latter, the step-father having died without having kept his agreement, and it being void under the statute of frauds, because not in writing.

ACTION to recover the amount of a claim presented by the plaintiff against the estate of John Gorman, deceased, for services rendered by her as his housekeeper. The circuit court directed judgment to be entered in favor of the plaintiff. The facts upon which plaintiff's claim was based were as follows: She was a step-daughter of the deceased, and as such lived with deceased and her mother until the death of the latter in 1879. Shortly after such death she left the house of the decedent and went to live with her brother, but was induced to return to the decedent, and become his housekeeper, by an oral agreement entered into between them that if she would keep his house and take care of him during the rest of his life he would devise and bequeath to her, as compensation for her services, all his real and personal property. After such agreement, the plaintiff became the housekeeper of the decedent, and continued to discharge her duties as such from the 1st of July, 1879, until his death, in March, 1887. He did not make any will. The estate of which he died seised consisted of realty of the value of \$1,300, and personalty of the value of \$790. The defendant appeals.

Van Dyke and Van Dyke, for the appellant.

Somers, Somers, and Dorr, for the respondent.

LYON, J. Undoubtedly the claimant, Mrs. Ellis, being the step-daughter of the deceased, John Gorman, and a member of his family, cannot recover against his estate for her services without proving an express promise or agreement on his part to pay her therefor. And such promise or agreement must be established by direct and positive evidence, or by circumstantial evidence equivalent thereto. It has been so held in many cases in this court, cited in the briefs of the respective counsel.

The agreement alleged in the complaint or claim of Mrs. Ellis, and found by the court to have been made, is, in substance, that if Mrs. Ellis would keep the house of the deceased, and take care of him during the residue of his life, he would devise and bequeath to her all his real and personal property as compensation for such services. The agreement was oral. When it was made, and when John Gorman died, his estate consisted of both real and personal property, but the most of it was real estate.

It is claimed on behalf of the administrator that the testimony fails to prove the above agreement. Mrs. Ellis testified as a witness in her own behalf. She gave no testimony in chief of conversations or transactions had by her with the deceased, but on her cross-examination, in answer to a question by counsel for administrator, she testified that she had read the statement of her claim in the complaint, and that the same is true. This is direct and positive evidence of the alleged express agreement, and is not controverted directly. Further than this, other witnesses testified, and their testimony is not disputed, that the deceased said to them, in substance, at different times, that Mrs. Ellis was to have all his property at his death, and that she understood it, or understood the agreement. In addition to the above testimony, the fact that she left him when her mother died, and only returned to live with him after repeated solicitations, is significant. True, many other statements of the deceased were testified to, which, standing alone, are little more than expressions of his intention to leave all his property to Mrs. Ellis, but, read in connection with the more direct and positive testimony of an agreement, they serve to emphasize such testimony. But, disregarding those expressions of intention, we think the testimony is sufficient, within

the rule above stated, to establish the alleged express agreement. We must therefore affirm the finding of the circuit court in that behalf.

The agreement thus established is in part for a devise of land, and the same was not evidenced by any writing signed by the testator. It is therefore within the statute of frauds: R. S., p. 654, sec. 2304. The fact that it included personal as well as real estate does not take it out of the statute, even as to such personal estate. Such a contract is indivisible, and failing in part, the whole fails. It was so held in *Clark v. Davidson*, 53 Wis. 317. Such is doubtless the law.

When the cause was on argument, a member of the court suggested to counsel the question whether the contract was not saved by performance on the part of Mrs. Ellis. But such performance on her part is not alone sufficient to take the agreement out of the statute of frauds. This is well settled. True, Mrs. Ellis remained in possession of the real estate after the death of John Gorman; but she was not put in possession under the void agreement, and such possession had no necessary reference thereto. Had the deceased put her in possession under the otherwise void agreement, it is probable we should have a proper case for specific performance; but he did not do so. The above suggestion to the counsel was made (in part at least) upon the strength of *Alderson v. Maddison*, L. R. 5 Ex. Div. 293. The defendant in that case was seeking the benefit of a parol contract by her employer to devise her a life estate in certain lands for many years' service as his housekeeper. She fully performed her agreement, but he died without making her the devise. Mr. Justice Stephen held, at the trial, that the agreement was originally within the statute of frauds, but that the application of the statute was barred by complete performance on her part. The rule there laid down would, in like manner, take the present case out of the statute, and give Mrs. Ellis an action upon the parol agreement. We find, however, that the judgment of Mr. Justice Stephen was reversed by the court of appeal (L. R. 7 Q. B. Div. 174); that court holding that performance of the parol agreement by the defendant did not exclude the operation of the statute of frauds. On appeal to the house of lords, the same rule was held, and the judgment of the court of appeal affirmed: L. R. 8 App. C. 467. Such, also, seems to be rule of this court: *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458; *Smith v. Finch*, 8

Wis. 245; *Brandeis v. Neustadt*, 13 Wis. 142. We think, therefore, that the concession made on the argument by counsel for Mrs. Ellis, that the parol agreement to devise the land to her is void under the statute, was well advised.

It remains to be determined whether such express agreement, which is void as a contract, is a sufficient ground upon which to base a claim for compensation *quantum meruit* for the services therein stipulated for. It is a verity in the case that the deceased expressly agreed by parol to pay Mrs. Ellis for her services, and that upon the faith thereof she entered upon such service, and continued therein until he died, thus fully performing her part of the agreement. Were this all, the agreement would be a valid express contract on his part to pay for such services what they were reasonably worth. But such agreement contains another provision which renders it void as a contract. It would be a severe rule to hold that, merely because such provision was included in the parol contract, no doubt through the ignorance of both parties of the effect of it, Mrs. Ellis should lose all compensation for eight years of most faithful service, when she stipulated in advance for such compensation, and the deceased agreed in advance (no doubt in perfect good faith) to compensate her therefor. After much investigation and thought, we have reached the conclusion that the case is not governed by any such harsh rule. The reasons which have brought us to this conclusion will now be briefly stated.

Owing to the relationship between Mrs. Ellis and her stepfather, and the fact that she was a member of his family, the legal presumption, in the absence of proof to the contrary, is, that her services were rendered gratuitously. The burden is therefore upon her to show that they were not so rendered, but that she was to be remunerated therefor. To meet this obligation she proved the express parol agreement for compensation. True, such agreement is void as a contract for the reasons stated, and hence cannot be enforced specifically, nor constitute the basis of an action for damages. But is there any just or sound reason why the express promise or stipulation therein to remunerate her should not still be operative, not as a contract, but to rebut the presumption that Mrs. Ellis rendered the services in question gratuitously?

True, this court has said in effect, in several cases, that the express promise or agreement required by the rule means a valid express contract. But in each of those cases a valid

express contract was asserted and relied upon to rebut the presumption of gratuitous service. Hence, as applied to and limited by the facts of those cases, the rule thus laid down was strictly accurate. Yet it does not necessarily conflict with the rule above suggested, that the presumption of gratuitous service may be rebutted by proof of an express promise or agreement to remunerate therefor, which by reason of some provision contained in it is void as a contract. Those cases hold that where a valid express contract is relied on to rebut the legal presumption of gratuitous service, such a contract must be proved. They do not necessarily hold, and it would probably be more *obiter* did they assume to hold, that such presumption is not also rebutted by proof of an express promise or agreement to remunerate, which for some reason is void as a contract. There may be a promise or agreement to do a particular thing, even though it falls short of being a valid contract. An examination of the cases above referred to will show that none of them present the question of the effect of a promise to remunerate, which cannot, under the statute of frauds, be enforced as a contract.

This view is not without authority elsewhere to sustain it. The same question was involved in *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222. The circumstances were very similar to those in the present case. After holding that the agreement there in question was within the statute of frauds, and could neither be specifically performed nor become the foundation of an action for damages, the court say of it: "It does, however, serve to rebut any presumption which might otherwise have obtained, that the services rendered were to have been gratuitously performed, or that they were performed under the mere expectancy that the intestate would leave the plaintiff's ward a legacy. She is therefore entitled to recover the value of her services." It is true, as counsel for the administrator argued, that the Indiana statute of frauds does not, like ours, make a contract void which contravenes its provisions, but, like section 4 of the English statute, merely takes away the right of action upon it. But while this difference leads to different results in certain cases, some of which are pointed out by Dixon, C. J., in *Brandeis v. Neustadt*, 18 Wis. 142, in other cases the results are the same under both statutes. We are unable to perceive that this difference in the statutes affects the questions here under consideration. If, under the Indiana statute, the inoperative agreement rebuts the presumption

that the services were rendered gratuitously, we think it should have the same effect under our statute.

The New York statute of frauds is the same as ours, yet it seems to be very well settled in that state that a recovery may be had for services otherwise gratuitous, if the plaintiff proves an express promise or agreement to remunerate therefor, although the same rests in parol, and the remuneration is to be made by a devise or conveyance of land: *Quackenbush v. Ehle*, 5 Barb. 469; *Robinson v. Raynor*, 28 N. Y. 494; *McRae v. McRae*, 3 Bradf. 199; *Reynolds v. Robinson*, 64 N. Y. 589; *Campbell v. Campbell*, 65 Barb. 639.

It was further contended by counsel for the defendant, in his very learned and able argument, that the parol contract to devise land for the services of Mrs. Ellis being void, it is an absolute nullity, and cannot be considered, for any purpose whatever, as ever having had an existence. Cases are not wanting containing language which seems to support this contention. But the rule is too strongly stated. It is entirely accurate to say that a void contract cannot be enforced. No attempt is here made to enforce one; but the fact is, that in the very large class of cases in which recoveries for money paid, or for services rendered under void contracts, have been upheld, it was competent and essential in each case to prove the contract and its invalidity before there could be any recovery. If the void contract contains no express stipulation to repay the money or to compensate for the services, the plaintiff recovers, in a proper case, on the implied promise to do so. If there is a stipulation in the void contract to repay the money advanced on it, or, as in this case, to compensate for the services rendered on the faith of it, the recovery is upon the express promise or agreement.

We must hold, therefore, that a person rendering services for another, which would otherwise be gratuitous (as in the present case), may recover therefor on proof that they were rendered pursuant to an express promise or agreement by the one receiving the services to compensate therefor, even though such promise or agreement contains provisions which bring it within the statute of frauds, and prevent its enforcement as a contract.

The judgment of the circuit court is affirmed.

STATUTE OF FRAUDS. — An oral promise to make a will in consideration of a conveyance of land to the promisor is void, as within the statute of frauds: *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46; and a contract void under the statute of frauds cannot be used for any purpose, for it is a mere

nullity: *Wardell v. Williams*, 62 Mich. 50; 4 Am. St. Rep. 814; *Raub v. Smith*, 61 Mich. 543; 1 Am. St. Rep. 619. But the statute of frauds cannot be set up to defeat an action upon *quantum meruit* for services of a minor son, under an express oral agreement repudiated by the minor before the expiration of the time mentioned in the agreement: *Freeman v. Foss*, 145 Mass. 361; 1 Am. St. Rep. 467.

STATUTE OF FRAUDS. — As to what acts constitute part performance of a verbal contract, so as to take the case out of the statute of frauds: Extended note to *Christy v. Barnhart*, 53 Am. Dec. 539-547.

PARENT AND CHILD. — Where children work for their parents after arriving at age, the law implies no contract on the part of the parents to pay for such services: *Poorman v. Kilgore*, 28 Pa. St. 365; 67 Am. Dec. 425, and note.

TWO RIVERS MFG. CO. v. BEYER. BEYER v. TWO RIVERS MFG. CO.

[74 WISCONSIN, 210.]

MERE INADEQUACY OF PRICE or consideration of a previous sale cannot affect the title of a subsequent *bona fide* purchaser, and is no evidence of any other fraud.

COSTS ARE MERELY INCIDENTAL TO AN ACTION based upon a sufficient cause, and if the cause of action is removed or discharged by payment, the action cannot be further prosecuted merely to recover the costs thereof.

THE RIGHT TO COSTS IS EXTINGUISHED BY ACCEPTANCE OF PAYMENT OF THE DEBT, either before or after the commencement of the action, and thereafter the court has no power to render judgment for costs. If there is no judgment on the cause of action there can be no further costs.

JURISDICTION IS TERMINATED WHEN THE CAUSE OF ACTION IS WITHDRAWN OR EXTINGUISHED. — The extinguishment of the cause of action is an extinguishment of the subject-matter of the suit, and leaves the court without anything over which it has jurisdiction.

VOID JUDGMENT FOR COSTS. — Where there is no power in a court to impose payment of costs, a judgment therefor is void.

LOSS OF JURISDICTION MAY OCCUR DURING THE PENDENCY OF AN ACTION over which the court had jurisdiction when it was commenced; and if jurisdiction is so lost, any further action of the court is a nullity.

JUDGMENT VOID BECAUSE OF LOSS OF JURISDICTION THROUGH THE DISCHARGE OF CAUSE OF ACTION PENDENTE LITE. — If an action is brought to foreclose tax certificates or other liens, and the plaintiff, during the pendency of the suit, accepts full payment of his lien, his cause of action is thereby terminated, and with it the jurisdiction of the court over the action, and the judgment subsequently entered for costs is void, and a sale made to satisfy it has no valid support, and is therefore ineffectual for any purpose.

Ellis, Greene, and Merrill, for the plaintiff.

Webster and Wheeler, for the defendants.

ORTON, J. The facts necessary to the decision of this case are briefly as follows: One J. Louis Pfau, Sen., was the origi-

nal owner of the lands in controversy. They were sold for taxes, and bid in by the county of Oconto, and said county held the certificates. George Beyer, one of the defendants in this suit, was the treasurer of said county. He employed one J. M. Simpson, a married woman, to buy of the county the tax certificates for him, he furnishing the purchase-money, and she did so purchase the same, and said Beyer, as such treasurer of the county, duly assigned the certificates to her on behalf of the county, to be held by her for his sole use and benefit, and subject to his orders or directions. Beyer sold the certificates to W. H. Webster, Esq., an attorney at law, and said Simpson, by his order, duly assigned them to said Webster. Whether Webster knew of the interest and secret trust of Beyer in them does not very clearly appear, beyond a strong suspicion based upon very significant circumstances. Webster commenced a suit of foreclosure of said certificates against Pfau, who was a non-resident, under section 1181, Revised Statutes, and Pfau, the defendant, made such answer as is allowed by said statute in such cases, by his attorney, one H. H. Woodmansee, and the cause was at issue.

Pending the case, Pfau negotiated with the plaintiff in this suit to sell said lands to it for an adequate consideration, but said plaintiff, on examination of the title, found these tax certificates outstanding, and refused to purchase said lands until they were redeemed. The plaintiff, at that time, had no actual notice or knowledge of the pending of said foreclosure suit. The said Pfau thereupon sent the money to his said attorney, Woodmansee, to redeem said certificates, and pay the costs of said suit. The attorney, Woodmansee, paid to the clerk of the county the money to redeem the lands from said sales, and obtained a certificate of the redemption thereof, and delivered it to the plaintiff in this suit, and notified the said Webster of such redemption, and Webster received and accepted said redemption money to his own use, as the holder of said certificates, without demanding the costs of said suit or any other moneys from said Pfau. But it seems that the attorney, Woodmansee, did not pay the costs of said suit. Thereupon the purchase of said lands from said Pfau was consummated by the plaintiff in this suit, and the consideration money paid. The said Pfau and the plaintiff both supposed that said suit was ended, and the said lands exempt from any lien or encumbrance on account thereof or of said certificates.

The said suit was commenced about the twenty-third day of May, 1883, and the certificates were so redeemed in December of that year. But the attorney, Woodmansee, did not pay the costs of said suit and have it discontinued of record, but, in fraud of said Pfau and the plaintiff, treated the cause as still subsisting, and on June 6, 1884, without the knowledge of said Pfau or the plaintiff, and without any employment or retainer by either of them since the suit was so disposed of by the redemption of said certificates, and the acceptance and receipt of said redemption moneys by the said Webster, and knowing that the plaintiff had become the purchaser of said lands and was solely interested in said suit, the said H. H. Woodmansee, evidently with the intent to defraud them both, filed an amended answer in said suit, as still subsisting, on behalf of said Pfau alone as the sole defendant, alleging therein that the lands were not subject to the taxes levied and assessed, and denying that any taxes on said lands were due and owing, and any knowledge or information that the plaintiff Webster owned said certificates. This amended answer was entirely unnecessary, for the original answer contained the same matters of defense. It was done by Woodmansee evidently with intent and in order to treat the said suit as still pending and subsisting, notwithstanding the redemption of said certificates and the receipt by him of the costs in order to have the same discontinued, and to defraud the said Pfau, his former client, and the plaintiff, and without their knowledge, and by fraudulent concealment thereof.

The next day after the amended answer was so filed there were certain findings of fact made by the court: 1. That the plaintiff was the actual holder and owner of said certificates when the suit was commenced; 2. That the lands had not been redeemed at that time; 3. That a certain amount was then due for taxes and interest, and for the necessary costs of the suit; 4. That Pfau, at the time, was the owner of said lands; and 5. That since the action was brought the defendant Pfau had redeemed the certificates. The conclusions of law were, that the plaintiff Webster was entitled to judgment for the costs and disbursements of the action, and that the same be decreed a lien on said lands, and in case they are not paid, the said lands, or so much thereof as may be necessary, should be sold therefor, and for all further costs and disbursements. The judgment of the same date is according to said conclusions of law, and Webster assigned the same to said Beyer.

The attorney, Woodmansee, wrote on the back of the findings that he approved of the same, and signed such approval as the attorney of said defendant Pfau. The costs not having been paid, all the lands were sold together by the sheriff for \$212.12, to one Willard P. Cook, who was employed by said Beyer to bid off the same, and hold the title thereof for him and his use and subject to his direction, and the sheriff's deed was duly made to said Cook, and said sale confirmed by the court. The attorney, Woodmansee, approved of the taxation of the costs and the confirmation of the sale, and accepted notice thereof for the defendant Pfau, and approved the disbursement of the proceeds of the sale. Afterwards the said defendant Beyer sold said lands to the husband of the defendant E. L. Dorr, who directed the said Cook to deed the same to her. She and her husband were then living in the state of Maine. The lands were worth at least five thousand dollars, and the tax certificates were of their face value of three thousand dollars. A *lis pendens* was filed with the foreclosure suit. The defendant E. L. Dorr is in possession

It is proper to repeat that neither the said Pfau nor the plaintiff knew anything of the proceedings after the redemption of the certificates. There is no direct proof that Webster knew that Woodmansee had received from Pfau the costs as well as the redemption money, or that there was any collusion between them, or between Webster and Beyer; but the facts and circumstances tend strongly to establish such an implication, and that Beyer still owns the land. Webster knew that he purchased the certificates from Beyer, as the real owner, when he had no right, being county treasurer, to either own or sell them, and he ought to have known that Woodmansee had no right to act as the attorney of Pfau after the suit was ended by the redemption of the certificates, and that he was defrauding both Pfau and the plaintiff. It is unnecessary to say anything further about the fraud of these transactions, for there was no clear and satisfactory proof that the defendant E. L. Dorr, as the purchaser from Cook, had any notice of it, and there was nothing to clearly show but that she was a *bona fide* purchaser for a valuable consideration.

The circuit court held in its findings that the inadequacy of the consideration of \$212.12 of the sheriff's sale to Cook "was sufficient to put her on inquiry as to the whole subject of that foreclosure suit" (whatever that may mean), and the conclusion of law is, that "the plaintiff is entitled to judgment set-

ting aside said judgment in the case of *Webster v. Pfau*, setting aside the sheriff's sale and deed to Willard P. Cook, and the deed from Willard P. Cook to E. L. Dorr, upon the plaintiff paying to E. L. Dorr, or into court for her use and benefit, the amount paid for said land at said sheriff's sale, to wit, the sum of \$212.12, and the cost of recording said sheriff's deed, to wit, \$1.50, with interest thereon at seven per cent per annum from the date of such sheriff's sale, to wit, October 31, 1885, until the time of said payment"; and such, also, is the judgment. That part of this determination requiring the plaintiff to pay such sum to the defendant E. L. Dorr was excepted to by the plaintiff's counsel, and that part of the above finding of fact that such "inadequacy of the consideration of \$212.12 of the sheriff's sale to Cook was sufficient to put Dorr on inquiry as to the whole subject of that foreclosure suit," was excepted to by the defendant's counsel.

We think that both of these exceptions were well taken. If the plaintiff is entitled to any relief as against the defendant E. L. Dorr, he is entitled to it unconditionally; and mere inadequacy of the price or consideration of a previous sale cannot affect the title of a subsequent *bona fide* purchaser in good faith, and is no evidence of any other fraud; and if the judgment was only irregular or erroneous, and not void, it was quite immaterial that she was put on inquiry or had notice of the foreclosure suit, for collaterally the judgment was valid.

The plaintiff's counsel excepted "to the failure of the court to find as a conclusion of law that the judgment in said action of *Webster v. Pfau*, in so far as it decreed any lien on said lands, was void for want of jurisdiction." This single exception is the only one that is material, or that we shall consider, and the findings of fact or conclusions of law of the court below need not be further considered. The evidence upon which this exception depends is indisputable, and we think the circuit court should have found that judgment absolutely void for want of jurisdiction in the court to render it. The question will be divided: 1. Could the court have legally retained the cause after the redemption of the lands from the tax-sales and certificates by the defendant Pfau and the receipt and acceptance of the redemption money by the plaintiff Webster, to render a judgment against the defendant for costs, and make such judgment a specific lien on the lands? 2. If not, was such illegality or error jurisdictional, so as to make the judgment and sale under it void?

1. The tax certificates were the cause of action, and the sole cause of action, of that suit of foreclosure. They are to be foreclosed in the same manner as mortgages (R. S., sec. 1181), and are the cause of action, the same as mortgages are the cause of action in suits of foreclosure. The redemption of the lands from the certificates, pending the suit of foreclosure, must have the same effect upon the suit as the payment of the mortgages, or the redemption of the lands from the mortgages, pending suits for their foreclosure. In both cases, respectively, the tax certificates and the mortgages are the subject-matter of the suits. The sole object of the suits is to foreclose them, and the sole result is the judgment of foreclosure. The suit is brought upon them, and on account of them alone. They are the principal of the suit, and the *lis pendens* as notice is of them alone, and of the lands upon which they are liens, and the title of which is involved in and will be affected by the action and the judgment therein. In all possible respects they are the same as any other causes of action, such as a promissory note, or a bond for the payment of money, a trespass, or damage-feasant, or any other which may be satisfied or discharged by the payment of money, and for which a judgment may be rendered. There could be no action without such a cause, or some cause of action. When such a cause no longer exists, there is no longer any cause of action, and the action is at an end. An action could not continue as an action when the cause has been removed, any more than an action could be commenced without a cause of action. The costs are merely incidental to an action based on a sufficient cause of action, and are not part of it, but the creature of the statute, which can only follow a judgment or final determination of an action, in which the cause of action is merged. An action cannot be brought merely for the costs thereof, nor can an action be maintained, after the cause of action has been removed, merely for the costs thereof, for then they would be no longer incidental, but the principal of the suit. Can an action be commenced to foreclose a mortgage or tax certificates, or on a note or bond, or for trespass, after the mortgage or tax certificates had been redeemed, or the note or bond had been paid, or the trespass satisfied, and the money had been accepted by the plaintiff? No more can such actions subsist and continue to judgment after such redemption, payment, or satisfaction had been acknowledged by the acceptance of the money. The action is ended when the cause of action is

taken out of it. The reason of the rule is apparent. It is inherent.

The following cases illustrate, as well as establish, this rule: In *Dunton v Reed*, 17 Me. 178, cattle had been impounded, and the plaintiff filed a libel for their forfeiture, and no damage had been claimed, and the court held that the damages were the sole cause of action, and the action could not be maintained merely for the costs and expenses of impounding. Chief Justice Weston said: "The expenses are incident to the remedy, which is based upon the damages sustained. Here no damage is claimed. The very ground which justifies and upholds the remedy is waived and abandoned." In *Osgood v. Green*, 33 N. H. 318, trespassing animals had been impounded, and the officers whose duty it was to examine the premises and assess the damages found that no damage had been sustained, and yet the action was brought to recover the expenses of impounding and costs of the inquiry. The court held that the damages were the ground of the action, and as there were no damages the action could not be brought or maintained merely for the expenses and the costs. In *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154, there were several joint trespassers and separate suits against each. One suit was settled, and the money received by the plaintiff, and the defendant discharged. It was held to operate as a discharge of the entire cause of action against all of the trespassers, and that after that there could be no recovery in the other suits, either for nominal damages or for costs. The court uses the following language: "If the damages had been satisfied or discharged before the suit was brought, no one would doubt that such satisfaction or discharge would be a good bar to the action. Is it any the less a bar because the satisfaction was after suit brought?" In *Buell v. Flower*, 39 Conn. 462, 12 Am. Rep. 414, the action was upon a promissory note, and the defendant paid and the plaintiff accepted and received what was due upon it, after the suit was brought, but no costs were paid or demanded. The action was retained by the plaintiff, and he claimed that he was entitled to a judgment for nominal damages and for costs, and the question was reserved for the supreme court. It was held that the suit was at an end by the plaintiff's acceptance of the money due on the note. The court said: "The voluntary acceptance of money in full payment of the debt operated as a discharge of the debt, and consequently as a discharge of the costs

incident to the debt"; citing *Ayer v. Ashmead*, 31 Conn. 447, 88 Am. Dec. 154, and *Canfield v. Eleventh School Dist.*, 19 Conn. 529. In *Bendit v. Annesley*, 42 Barb. 192, an action had been brought upon a promissory note, and the defendant sent to the plaintiff his check for the debt, interest, and protest, and the plaintiff received and accepted the same in the full payment thereof. Afterwards the plaintiff claimed that the costs also should have been paid, and demanded the same. It was held that the suit could not be continued merely for judgment for the costs, and that the debt, which was the principal, having been paid, and the payment accepted by the plaintiff, and thus extinguished, the costs, which were an incident of such principal, were extinguished also. Judge Barnard said in his opinion: "Costs of suit are but an incident to the debt to recover which the action is brought. The extinction of the principal carries with it the incident. If the plaintiffs meant to insist on the payment of the accrued costs, they should have refused to receive the payment of the debt, unless the costs were paid." In *Johnson v. Brannan*, 5 Johns. 267, the action was also on a promissory note, which was paid and the payment accepted after suit brought. It was held that the court had no power to render judgment for costs. The costs do not accrue until judgment in the main action. Until then they may be abolished or changed by statute. If there is no judgment on the cause of action, there can be no costs: *Hunt v. Middlebrook*, 14 How. Pr. 300; *Torry v. Hadley*, 14 How. Pr. 357; *Supervisors v. Briggs*, 3 Denio, 173.

But this identical question has been decided by this court, and some of the above cases cited and approved. In *Geiser T. M. Co. v. Smith*, 36 Wis. 295, 17 Am. Rep. 494, the action was on a promissory note, and the defendant, after it was commenced, paid the note, principal and interest, and the plaintiff's attorney accepted the money, but claimed \$17 costs, which the defendant refused to pay, and there was an agreement in the note to pay the plaintiff five per cent for attorney's fees if suit be brought on the note. The plaintiff refused to surrender the note, and retained the action, and obtained a judgment for the costs. It will be seen that this is a very strong case against the rule, and yet this court held that "whether the suit was commenced or not, the acceptance by the plaintiffs of full payment of the amount due on the note extinguished their right to prosecute it." Chief Justice Ryan said in the opinion: "It may be that the plaintiffs might have

refused the payment, and prosecuted the suit to judgment for damages and costs. But they could not receive the damages and reserve the right to prosecute the suit for costs. . . . In such cases the right to recover costs is a mere incident of the right to recover damages." In *Mason v. Beach*, 55 Wis. 607, during the pendency of the suit to foreclose the mortgage, the plaintiff executed a quitclaim deed of the premises to the defendant, the mortgagor, and it was held that the discharge of the mortgage was a complete bar to the action. These two cases settle the question for this state that the plaintiff had no right to obtain judgment in this case for costs, after the redemption of the certificates and his acceptance of the redemption money.

2. Was this error or illegality jurisdictional? and was the judgment void? The contention of the learned counsel of the defendants is, that the court having had jurisdiction of the cause when it was commenced, anything irregularly, illegally, or improperly done by the court afterwards in that suit is merely erroneous, and not jurisdictional or void. But this contention is not supported by reason or authority. There is every possible reason for so holding. "Jurisdiction is the power to hear and determine a cause." In this case the cause was disposed of and determined by the removal of the cause of action therefrom. The jurisdiction of the court in that action was terminated. Has the court jurisdiction to hear and determine and render judgment in a pretended action, when no cause of action is shown or claimed? No more has the court the jurisdiction to continue the action and render judgment therein after the cause of action has been withdrawn from it or is out of it any way. It has no jurisdiction except to dismiss it or expunge it from the records. Jurisdiction must be of the subject-matter of the action, as well as of the parties. If there never was or there is no longer any subject-matter of the action, then there is no jurisdiction. This proceeding itself is statutory, and the costs are not only generally the creature of the statute, but in this case can only follow a judgment of foreclosure. The statute does not give the court power to render a judgment for costs, except with or incident to the judgment of foreclosure. The statute, therefore, does not confer any jurisdiction to render such a judgment. Authorities are numerous that a court can lose jurisdiction after it has acquired it, as readily as it can assume it where there is none in the first place. If a justice fails to enter in his docket an

adjournment of a cause, the courts say that he has lost jurisdiction to further try the cause.

But this question, like the other one, has been repeatedly decided by this court. In *Hurlbut v. Wilcox*, 19 Wis. 419, on *certiorari* to the justice, his judgment for costs against the defendant for \$26.54 was set aside on the ground that the statute only allowed him to recover in such a case \$15, and that the court had no jurisdiction to render the same, and that the judgment for costs was void. Chief Justice Dixon said in the opinion that "in this he clearly exceeded his jurisdiction, and the judgment as to costs must be quashed." In *Faust v. State*, 45 Wis. 273, an information charging the defendant with unlawfully keeping and maintaining a saloon, etc., the circuit court rendered judgment that the defendant pay the costs of the prosecution, amounting to \$178.20, and stand committed until paid, and this court held that the circuit court had no power to render such a judgment for costs, on the ground that the statute did not so provide; and Mr. Justice Taylor cites the language in *Taylor v. State*, 35 Wis. 298, "that unless the law expressly provided that the costs of the prosecution could be adjudged to be paid by the defendant upon his conviction of an offense, there was no power in the court to impose the payment of such costs upon the defendant." In *Noyes v. State*, 46 Wis. 250, 32 Am. Rep. 710, judgment for costs was rendered against the state, and Chief Justice Ryan said in the opinion: "It is very certain that no statute of this state gives any authority to this court to render judgment for costs against the state in a criminal prosecution; and that this court has no jurisdiction to render such a judgment, even were it so ordered by the mandate of the supreme court of the United States." It might be said here, neither has the statute given any authority to the court to render a judgment for costs against the defendant in this case, except as following a judgment of foreclosure of the tax certificates, or after they have been redeemed and the plaintiff has accepted the redemption money, as we have seen. The statute requires that the justice shall enter in his docket every adjournment of a cause, etc.: R. S., sec. 3574, subd. 5. In *Brahmstead v. Ward*, 44 Wis. 591, the justice failed to make such entry, and it was held that he thereby lost jurisdiction to render any judgment in the case. Mr. Justice Taylor said in the opinion that "unless such entry be made the justice loses jurisdiction," and refers to *Grace v. Mitchell*, 31 Wis. 533; 11

Am. Rep. 613; *Roberts v. Warren*, 3 Wis. 736; and *Brown v. Kellogg*, 17 Wis. 475.

Many other cases in this court of the same kind might be cited. How is this? May not a court have jurisdiction of a cause in the first place, and lose it by some subsequent event? This is the real question in this case. In *In re Pierce*, 44 Wis. 411, it was held that although the court had jurisdiction of the case for the contempt, the order of commitment was in excess of its jurisdiction, and that the remedy by *habeas corpus* was applicable. In *In re Crow*, 60 Wis. 349, it was held, on *habeas corpus*, that the prisoner had suffered his full term of imprisonment, and that therefore the jurisdiction of the court was lost to imprison him further, and that the order of arrest was void. Many other cases in this court might be cited to the same effect, and the doctrine is firmly established that, although the court may have had jurisdiction of the cause, it might lose it and do acts in the same without the authority of law that would be void for want of jurisdiction. But I have extended this inquiry far enough, and perhaps too far. The question is an important one, and especially important to the parties. Reference may be had to the able brief of the plaintiff's counsel for other arguments and authorities. It follows, therefore, that the judgment for costs in the case of *Webster v. Pfau*, and the sale of the lands under it, are void. This invalidates the title of the defendants Willard P. Cook and E. L. Dorr: *Manning v. Heady*, 64 Wis. 630.

To raise any question as to whether the consent and approval of the attorney, Woodmansee, to and of these proceedings is binding upon Pfau, the defendant in that case, is preposterous and absurd. What he did or attempted to do on behalf of his former and defrauded client, after the case in which he had been retained was at an end by the redemption of the certificates, was only in aid of the scheme to defraud and swindle his former client and the plaintiff out of the lands. He had no employment or authority to act further as the attorney of Pfau after he knew that the case was ended and that Pfau had sold the lands to the plaintiff and had no further interest in them or in the suit. He acted in the interest of other clients, and served them in what he did after that.

The question was raised by demurrer, that the two causes of action of *quia timet* and ejectment cannot be joined. The objection is more technical than substantial. The plaintiff had the right to bring this suit to set aside these clouds and

encumbrances upon its title, and the prayer for the recovery of the possession may be treated as a prayer for full relief in one action. This is according to a familiar rule, that when a court of chancery obtains jurisdiction of a cause it will retain it to administer full relief.

The assignment of the judgment to George Beyer goes with the judgment, and was, of course, nugatory. As to the other defendants, their rights were in the tax certificates, and they had been redeemed, so that they are disposed of without the necessity of holding that Webster was guilty of a fraud, or that he held the certificates in the interest of and in trust for Beyer, the county treasurer.

This disposes of the whole case, as we understand it. The decision and judgment of the circuit court, although very informal and confused, are in the main correct. The only errors were in requiring the plaintiff to pay anything as a condition of relief, and rendering the judgment on insufficient and untenable grounds. The findings of fact were also in the main correct, but they are so broken in upon by so much of opinion and argument that their coherency and point are much impaired. The judgment will have to be reversed to get rid of this improper condition of payment by the plaintiff; but we do not think that the plaintiff ought to pay any costs.

On the appeal of the plaintiff the judgment is reversed, and the cause remanded, with direction to render judgment setting aside the judgment in the case of W. H. Webster against J. L. Pfau, Sen., and the sheriff's sale of the lands under it, and the sheriff's deed to Willard P. Cook, and the deed from Willard P. Cook to E. L. Dorr, the defendant, and that the title to the lands be confirmed in the plaintiff, and that he have possession thereof. On the appeal of the defendants the judgment is affirmed.

COSTS. — If a creditor, after commencing an action to recover his debt, accepts payment of the amount due, he cannot proceed with the action to recover costs: *Geiser Threshing Machine Co. v. Smith*, 36 Wis. 295; 17 Am. Rep. 494, and cases cited in the opinion of that case; for costs included in a judgment are only accessory, and are discharged if the principal debt is discharged: *Clark v. Rowling*, 3 N. Y. 216; 53 Am. Dec. 290. So a plaintiff who had recovered damages and costs, and who, pending an appeal by defendant from the taxation of costs, took out an execution for damages only, which was duly served and returned satisfied, was deemed to have waived his costs: *Davis v. Ferguson*, 148 Mass. 603. But costs are an incident of the judgment; and where parties stipulate that a plaintiff may take judgment against the defendant, the plaintiff will be entitled under the stipulation to costs: *Stewart v. Corbus*, 15 Or. 68.

VOID JUDGMENTS. — All proceedings based upon void judgments are absolute nullities, irrespective of notice or *bona fides*: *Great West Mining Co. v. Woodmas etc. Mining Co.*, 12 Col. 46; 13 Am. St. Rep. 204. The reasoning of the court in the principal case is somewhat startling. It subjects judgments to collateral assault, after unquestioned jurisdiction over the parties has been obtained, because of the occurrence of facts *pendente lite* not capable of ascertainment from the files and records, and to which the attention of the court was not directed. It declares that a judgment may be pronounced void because the court, during the pendency of the action, ceased to have jurisdiction over the subject-matter, and that it ceases to have such jurisdiction when the demand sued for has been satisfied. The error of the court, we conceive, arose from its assumption that the debt or demand sought to be enforced was the subject-matter of the action. If this assumption be correct, then the necessity for a demand or debt or other right of action in the plaintiff, at the commencement of his proceedings, ought also to be affirmed as an essential of jurisdiction. For, surely, if a court cannot exercise jurisdiction because the cause of action has been extinguished, it must be equally powerless when no cause of action ever existed. It is not the debt, demand, or right to relief which constitutes the subject-matter of jurisdiction; for the exercise of the jurisdiction often results in the judicial establishment that the plaintiff had no debt, demand, nor right to relief. In that event, the court is not ousted of jurisdiction, and required to dismiss the action. Its duty is, rather, to proceed to render judgment, on the merits, against the plaintiff, and in favor of the defendant. The subject-matter of jurisdiction is to be found in the allegations of the litigants, and not to be ascertained outside of them. If the complaint filed presents a case entitling the plaintiff to the action of the court, then there is a subject-matter, though no evidence can be adduced to support any of the allegations in the complaint, or though all of them may be subsequently disproved, or confessed to be untrue.

If, by any means, a complaint once filed in court could be withdrawn from the files so that the court could have no further right to consider whether it was true or false, or to grant either party any relief, if true or false, or if, while the complaint remained on file, the court were either destroyed, or its powers so restricted that it no longer had authority to consider the complaint, or to grant relief to either party, then a case would be presented, either of the withdrawal of a subject-matter from jurisdiction, or of the withdrawal of jurisdiction from a subject-matter. The change, on the one hand, would be apparent from some action taken in court, and to be ascertained from its records or files, while, on the other hand, loss of jurisdiction would be disclosed in some statute or constitution destroying or diminishing the powers of the court.

If anything occurs *pendente lite* terminating a plaintiff's right to recover, surely this does not destroy jurisdiction, but the rather requires that jurisdiction shall, on proper supplemental pleadings, be exercised over the changed condition of affairs, to the end that the cessation of the right of recovery be judicially established. In the principal case, the alleged payment of the cause of action might doubtless have been made known to the court by proper supplemental pleadings, on which issues might have been formed and evidence received. Neither the pleading nor the evidence could have shown that there was no longer a subject-matter of jurisdiction. They would rather tend to exhibit an additional subject-matter, viz., an issue respecting an alleged discharge *pendente lite* of the original cause of action. The establishment of the issue tendered by the defendant would not oust the court of

jurisdiction. If it did, the judgment should be merely of dismissal of the action for want of jurisdiction, leaving the plea of satisfaction *pendente lite* undetermined; for if a court has not jurisdiction, it can do nothing beyond proclaiming that fact.

Of course, a plaintiff accepting satisfaction *pendente lite* may be reasonably expected to discontinue his action, instead of taking judgment as originally prayed for, and his disappointing this expectation is inequitable, and a proper subject of redress in equity; but this is quite a different thing from declaring that all further action of the original court is void, and that no necessity exists for the aid of a court of equity.

MERE INADEQUACY OF CONSIDERATION is not good reason to set aside a sale: Note to *Wesser v. Nugent*, 13 Am. St. Rep. 800.

SELDEN v. STATE.

[74 WISCONSIN, 271.]

ATTORNEY AT LAW, PRIVILEGED COMMUNICATION TO.—LETTERS FROM A HUSBAND TO HIS WIFE, which the latter places in the hands of her attorney, are confidential communications, which the attorney has no right to produce in court as evidence against the husband.

CONFIDENTIAL COMMUNICATION BETWEEN HUSBAND AND WIFE.—THE ADDRESSES ON ENVELOPES AND IN LETTERS WHICH THE HUSBAND HAS WRITTEN AND MAILED to his wife cannot be admitted in evidence against him to show that he committed perjury in swearing that he did not know her place of residence. Every part of such letters, including the envelopes and addresses, must be treated as confidential communications from the husband to the wife.

C. S. Matteson, for the plaintiff.

C. E. Estabrook, attorney-general, and *L. K. Luss*, for the state.

ORTON, J. The facts necessary to an understanding of the errors assigned are substantially as follows: On the twenty-fifth day of July, 1887, there was an action pending in the circuit court of Fond du Lac County, in which the plaintiff in error was plaintiff, and one Emma S. Selden, his wife, was defendant, for a divorce on the ground of adultery. The information charges that the plaintiff in error committed the crime of perjury by swearing falsely in a certain affidavit made by him before one James T. Green, Esq., a notary public of said county, in order to procure an order of publication of the summons in said action, and as a witness on the trial of said action, that he, said plaintiff in error, had been a resident of the state of Wisconsin for more than one year immediately preceding the commencement of said action, on the said twenty-fifth day of July, 1887, and that, after due diligence

and search, he was unable to find the whereabouts of the defendant, Emma S. Selden, and was unable, after due diligence, to make service of the summons in said action upon said defendant, and was unable, after due diligence and search, to ascertain the post-office address of said defendant; and that when asked, as a witness on the trial of said action, "How long have you resided in the state of Wisconsin?" he falsely swore, "It is nearly two years"; and when asked whether he had seen the said Emma S. Selden since the sixteenth or seventeenth day of March, 1886, he falsely swore that he had not; and when asked whether he knew the whereabouts of the said Emma, he falsely swore that he had not been able to find out where she was.

The plaintiff in error was found guilty of the perjury so charged, December 29, 1888, and upon the verdict he was sentenced to the state prison for the term of two years. A motion was made to set aside the verdict, and for a new trial, and also a motion in arrest, which were overruled.

On the trial, George P. Knowles, Esq., an attorney at law, was introduced as a witness for the state, and testified, substantially, that he was employed by Emma S. Selden, the defendant in said action for divorce, to get the judgment of divorce in said action set aside, so as to allow her to defend the same, and that, while he was so employed, the said Emma S. Selden placed in his hands certain letters, numbered from 1 to 65, which she received from the plaintiff in error while they were still husband and wife, and that, in his opinion, the signature to the same was in the handwriting of the plaintiff in error. These letters appear to have been written by the plaintiff in error to his said wife, Emma, and directed to her under dates ranging from January, 1886, to June, 1887, at the place where she then resided in the state of Michigan, with their envelopes of the usual address, and mailed at various places. He was asked to produce said letters. This was objected to by the counsel of the plaintiff in error, and the objection was overruled. The letters were then produced, and the district attorney offered in evidence the date and place from which the letters appear to have been written, the address to his wife, and the signature of the plaintiff in error, together with the envelope, and the post-marks and address thereon, and did not otherwise offer the contents of said letters. This was also objected to by the counsel of the plaintiff in error, and the objection was overruled. These parts of the said letters

and the envelopes were admitted to show that the plaintiff in error knew the residence of the said Emma S. Selden at the time he so swore, and was able to find the whereabouts of the said Emma, and that he was able to make service of the summons in said action upon her, and that he could have ascertained, after due diligence and search, the post-office address of said Emma, and that he was able to find out where she was at that time, and to show, also, his residence for the one year previous to said suit. For that purpose, these letters, to the extent in which they were offered in evidence, were most clearly material, if they were competent, and not privileged.

It is contended by the learned counsel of the plaintiff in error that such evidence was incompetent and inadmissible, for the reasons,— 1. That they were disclosures of confidential communications between husband and wife; and 2. That the production of the same by Knowles, the attorney of the defendant in that action, was also unlawful, as betraying the privileged confidences between himself and her, as attorney and client.

We think that both of these positions were well taken, and that the circuit court erred in allowing the said Knowles to produce them, and in allowing the letters, to the extent offered, to be used as evidence or examined by the jury. So far as Knowles, the attorney of the defendant, Emma, was concerned, the production by him of the letters as genuine was a double violation of this protected confidence: 1. Of that reposed in him by his client, Emma S. Selden; and 2. Of that between herself and her husband, without her consent. If these letters were confidential as between herself and her husband, they were none the less so in the hands of her attorney, Knowles; and if she could not disclose them, of course he could not. But, besides this, he was betraying her confidences also, which was a double violation of the rule. She had demanded a return of these letters before he so disclosed and produced them. It is surprising that when she was unwilling herself to disclose or produce these letters of her husband, and was unwilling that her attorney, Knowles, should do so, Knowles should have been allowed to authenticate and produce them, and that the district attorney should have been allowed to introduce them in evidence, to the extent they were offered, to convict the husband of the crime with which he was charged. In her letter to her counsel, Knowles, dated December 1, 1888, she demanded a return of

the letters, as she says, "in your charge, and left with you while you were acting as my attorney and counsel. I intrusted them with you as such counsel, to be used only in assisting me in litigation, and from which to secure your advice. The letters I consider confidential communications between myself and husband, and in no other way; and while I was your client I intrusted them with you knowing the confidential relations existing between attorney and client." This letter was in evidence.

The authorities cited by the attorney-general are very far from being applicable to a case like this. Knowles was not an "eavesdropper," or a person who merely overheard communications or conversations between husband and wife; and it made no difference in favor of their admissibility that he used the letters as his authority for making the original complaint against the plaintiff in error, or in instituting the prosecution against him. It is a case where the husband is on trial for a crime which did not involve any personal violence or injury against herself; and what he had said or communicated to her as his wife is sought to be proved against him, either by his (the attorney's) voluntary disclosure of them as a witness, or by the production of his letters containing such communications; and, more than this, the letters containing such confidential communications are confided to her counsel for no such purpose, and he voluntarily authenticates and produces them, in violation of her confidences with her husband and her confidences with himself as her counsel, and without her consent, and against her directions. There is not an authority by the decision of any respectable court that sanctions the disclosure of such confidences between husband and wife, and attorney and client. It is too plain for argument.

But it is said that the particulars of the letters and envelopes admitted in evidence were not the letters themselves containing such confidential communications. These particulars were material parts of the letters, and pertinent to the issue. Without them, there would be no letters or envelopes, as such. He has told her by these particulars that he knows where she lives, and where she can be found, at the time he swore that he did not so know. These parts of the letters and envelopes contained these material and confidential communications, and are the most objectionable of any.

Both branches of this evidence are made incompetent by

our statute. "A husband or wife shall not be allowed to disclose a confidential communication made by one to the other during their marriage without the consent of the other": R. S., sec. 4072. "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment": R. S., sec. 4076. These statutes express the most stringent rules ever laid down by the courts for the protection of connubial and professional confidences. They would seem to have been specially made for this case. The facts here meet every letter of these statutes.

Aside from these statutes, this disability of husband and wife and of an attorney has been established by numberless decisions of the courts in this country and in England. The principles upon which it is established have become elementary. Only a few cases need be referred to, and such as are particularly applicable to the facts: *Mills v. United States*, 1 Pinn. 73; *State v. Dudley*, 7 Wis. 664; *Livesley v. Lasalette*, 28 Wis. 88; *Yager v. Larsen*, 22 Wis. 184; 1 Greenl. Ev., secs. 884-887, 842; 2 Russell on Crimes, 986; 2 Kent's Com. 178; *Stein v. Bowman*, 13 Pet. 209, 221; *Dexter v. Booth*, 2 Allen, 559; *Bliss v. Franklin*, 18 Allen, 244; *Fitch v. Hill*, 11 Mass. 288; *State v. Welch*, 26 Me. 30; 45 Am. Dec. 94. As to the relation of attorney and client, we may refer to *Getslaff v. Seliger*, 43 Wis. 297; *Bacon v. Frisbie*, 80 N. Y. 894; 36 Am. Rep. 627; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Foster v. Hall*, 12 Pick. 93; 22 Am. Dec. 400; *Bolton v. Liverpool*, 1 Mylne & K. 88; *Greenough v. Gaskell*, 1 Mylne & K. 98; *Moore v. Terrell*, 4 Barn. & Adol. 870; *Brown v. Payson*, 6 N. H. 445; 1 Greenl. Ev., secs. 237-240, and note; *Hatch v. Fogerty*, 40 How. Pr. 498-504. Many other cases are cited in the able brief of the learned counsel of the plaintiff in error, to which reference may be had. This evidence was material to prove the perjury charged, and its admission was clearly erroneous.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Fond du Lac County, who will hold him in custody until he shall be discharged by due course of law.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—As to what communications between attorney and client are privileged: Note to *Bacon v. Frisbie*, 36 Am. Rep. 631-633; note to *Coveney v. Tannahill*, 37 Am. Dec. 296, 297. A communication from a client to his attorney may be admitted in

evidence, but the attorney cannot, without his client's consent, testify concerning such communication: *Taye v. Carr*, 37 Kan. 141. Communications, which are privileged between attorney and client, may be detailed in evidence by an officer who heard them: *Cotton v. State*, 87 Ala. 75. The testimony of a witness as to conversations with a party to an action cannot be excluded merely because the witness was an attorney at law: *People v. Lenon*, 79 Cal. 626; for communications, to be privileged, must be made to an attorney for the purpose of obtaining counsel or legal advice: *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570.

HUSBAND AND WIFE — PRIVILEGED COMMUNICATIONS. — Neither husband nor wife may disclose any confidential communications made by one to the other during marriage: *Pickens v. Knisely*, 29 W. Va. 1; 6 Am. St. Rep. 622. A divorced wife cannot testify against her former husband as to conversations occurring between them during the existence of the marriage relation: *Breck v. Breck*, 116 Pa. St. 109.

PITTSBURG MINING COMPANY v. SPOONER.

[74 WISCONSIN, 307.]

CORPORATIONS. — PROMOTERS OF A CORPORATION WHO ON ITS FORMATION become officers thereof must be treated as its agents and trustees, and held accountable to it for any profits which they realize upon property bought for and sold to the corporation.

CORPORATION. — IF PROMOTERS OF A CORPORATION HAVE OBTAINED AN OPTION for the purchase of property at a certain price, and have proceeded to form a corporation, representing to persons whom they induced to subscribe for its stock that such option would cost a larger price than they have agreed to pay, and if, after procuring such subscription, they purchase the property at the smaller price and charge the corporation the higher, it may sustain an action against them, and recover the difference between the two prices.

CORPORATION MAY MAINTAIN AN ACTION AGAINST ITS PROMOTERS to recover profits realized by them from the sale of property to the corporation at a sum which they represented to be the cost price, but which was in fact in excess of such price.

AGENTS RECEIVING MONIES UPON ILLEGAL SALE OF STOCK OF A CORPORATION CANNOT SET UP THE ILLEGALITY of the transaction as a defense to an action by the corporation to compel them to account therefor.

CORPORATION. ESTOPPEL TO CONTEST VALIDITY OF FORMATION OF. — PERSONS WHO HAVE BEEN INSTRUMENTAL in the formation of a corporation and in issuing alleged illegal stock, and who have contracted with the corporation with full knowledge of all its transactions, are not in a position to contest the regularity of its formation.

ACTION by the Pittsburgh Mining Company to recover seventy thousand dollars had and received by the defendants for the use of the company. The complaint alleged that the defendants conceived the idea and agreed together to promote the organization of the plaintiff for the ostensible purpose of min-

ing iron, but for the real purpose of cheating those who might deal with the corporation, and enriching themselves; that in pursuance of the scheme the defendants obtained an option to purchase certain mining claims for the sum of twenty thousand dollars; that the defendants then proceeded to obtain subscriptions to the capital stock, falsely and fraudulently representing to divers persons, and to all persons who became and are now stockholders, that the price demanded for said option was ninety thousand dollars, and that it could not be bought for less, and that it would be necessary, for the purpose of operating the business, to raise the sum of one hundred thousand dollars, of which ninety thousand dollars should be used for purchasing such option and the balance to be put in the treasury of the company to develop the mines; and that, in furtherance of their fraudulent scheme, the defendants drew up and procured to be signed a subscription paper, of which the following is a copy: "The undersigned hereby agree with A. H. Main, of the city of Madison, Dane County, Wisconsin, the owner of a mining option upon, in, and to all of the north half of the southwest quarter of section No. 11, town 47, range 45 east, of the Michigan meridian, situate, lying, and being in the county of Ontonagon, state of Michigan, and with each other, that they will take of and from the said A. H. Main the number of shares of non-assessable, paid-up stock in the Pittsburg Mining Company, proposed to be formed, set opposite their respective names, and pay for the same the sum of \$2.50 per share, said payment to be made as soon as the company is duly incorporated under and by virtue of either the laws of the state of Michigan or Wisconsin, and the said A. H. Main shall assign and transfer over to said corporation, and give and convey to said corporation, a perfect title to the same said option. It is understood that the capital stock of said corporation shall be one million dollars, in forty thousand shares of twenty-five dollars each. It is also understood and agreed that a shaft has been sunk, upon the land covered by said option, to a depth of about seventy feet, and that there is in sight, at such depth below the surface of the land so covered by said option, ten thousand tons of iron ore." That the subscription paper was signed by a large number of persons agreeing to take shares in a sufficient amount in the aggregate to cover the entire proposed stock of the projected corporation, to wit, one million dollars; that as soon as the stock was subscribed, to wit, on March 21, 1887, the defendants organized the plain-

tiff corporation and were its only original incorporators; that at a meeting of the corporation on March 22 of the same year all the defendants were present, the defendant Spooner was elected president, and the defendant Main treasurer, and: the defendant Main, with the advice and procurement of the other defendants, and, in their joint interests, subscribed for the entire stock of the corporation except one share each, taken by the defendants Spooner and Oakley, and the meeting, by the unanimous vote of the defendants and sole corporators and directors, adopted the following resolutions: "Resolved, that, in accordance with the subscription of A. H. Main to the capital stock of said company, the president and secretary hereof issue to him, or to such person or persons as he may direct, and in such number of shares as he may direct, all of the said stock, except two shares thereof, one of which is held by said Phillip L. Spooner, Jr., and the other by said F. W. Oakley, the said stock to the said Main to be issued as paid up in full, in consideration of his making and delivering to the president of the said corporation, for the said corporation, an assignment in writing, duly executed, of an option which he now owns on the north half of the southwest quarter of section eleven (11), township forty-seven (47), range forty-five (45) east, Ontonagon County, Michigan." That none of the stock subscribed for by the defendant Main was ever issued to him except twenty-five thousand dollars; that although he conveyed to the corporation the mining option in nominal payment for all the stock of the corporation, neither he nor any of the defendants ever had any interest in the said option above the price of twenty thousand dollars; that the defendants, in furtherance of their fraudulent scheme, caused the option to be conveyed to said Main without consideration; caused the corporation to buy it for him for substantially its entire capital stock; caused the agreement to take shares in the projected company to be read as an agreement to be taken of said Main instead of the company, and then issued the shares so subscribed for to the several persons, who, by the agreement aforesaid, had agreed to take them and collect from them the sum of one hundred thousand dollars, out of which was paid twenty thousand dollars for the option, ten thousand dollars into the treasury of the company, and the remaining seventy thousand dollars was converted by defendants to their own use. The complaint was demurred to upon the ground that plaintiffs did not have legal capacity to sue, and that it did not state

facts sufficient for a good cause of action. The demurrer having been sustained, the plaintiff appealed.

Tenney, Bashford, and Tenney, and John M. Olin, for the appellant.

H. W. Chynoweth, and Gregory, Bird, and Gregory, for the respondents.

TAYLOR, J. Upon the hearing of the appeal in this court, no contention was made by the learned counsel for the respondents that the demurrer was properly sustained upon the first alleged ground, viz., that "the plaintiff has not legal capacity to sue." The only question argued at length was, whether the complaint stated facts sufficient to constitute a cause of action. The learned counsel for the appellant corporation contend that the complaint states facts constituting a cause of action,—1. Upon the ground of actual fraud committed by the defendants upon the company by the sale of the mining option to the company for a sum greatly in excess of its real value, brought about by false representations as to its actual cost; and 2. That it states a cause of action against the defendants as the promoters of the corporation, and, as such, holding a relation of trust and confidence towards it; and that, acting as the agents and officers of the corporation, they sold to the corporation, and bought for the corporation, the mining option for the sum of seventy thousand dollars more than its actual value, and more than they paid for the same; that this was done without the knowledge and consent of the real stockholders of the corporation, and in fraud of their rights, and upon that ground they are liable to the corporation for the profits made by them on such sale to the corporation. The last alleged cause of action is the one upon which the learned counsel for the appellant mainly relies in this court, and is the one in favor of which the main argument of the learned counsel for the appellant is made.

Considering the defendants as the officers and promoters of the corporation at the time of the alleged purchase and sale complained of, it seems to me very clear that, laying out of view the fact that the money of the stockholders paid for their stock to the corporation, and which money was paid to defendants for the mining option, was obtained by the issuing of full-paid shares to the stockholders upon the payment of ten per cent of their par value, in violation of the statute, there can hardly be room for a contention that, upon the facts

stated in the complaint, a cause of action is not stated against the defendants. Under the allegations of the complaint, we must treat the alleged sale of the mining option to the defendant Main for the entire stock of the corporation, — viz., one million dollars,—as a mere subterfuge and device to cover up the real transaction, which is substantially as follows: The defendants, having obtained a right to purchase the mining option mentioned in the complaint for twenty thousand dollars, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for the stock that it would cost ninety thousand dollars to make such purchase, and having first induced other persons to subscribe for the stock upon such representations, and to pay to the corporation upon or for their stock one hundred thousand dollars, the corporation then, through its officers, the defendants themselves, purchased the option for ninety thousand dollars, paying the twenty thousand dollars which it cost them with the money received by the corporation, and converting the seventy thousand dollars to their own use. This is the substance of what is alleged to have been done by the company, and it appears to me to be immaterial as to the manner of doing it. It being shown that the defendants formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish ninety thousand dollars of their money to make the purchase, under the false impression created by the defendants that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterwards, as officers and agents of the company, purchased for the company such option, and paid themselves seventy thousand dollars more than they knew they could purchase it for, and seventy thousand dollars more than they in fact paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the seventy thousand dollars so obtained. In making this statement, we are not to be understood as making any charge of fraud or unfair dealing on the part of the very respectable citizens who are the defendants in this action; all that is intended is, that, admitting that the allegations of the complaint in this action are true, then the result indicated follows. The truth or falsity of these statements is not now under consideration. For the purposes of this case, the defendants do not controvert them.

That the defendants were promoters of the corporation, and as such, and as the officers of the same, they assumed the posi-

tion of agents and trustees of the corporation in the transaction of its business, admitting the facts as stated in the complaint to be true, there can be no doubt. This is well established by the following cases, cited by the learned counsel for the appellant, viz.: *Society v. Abbott*, 2 Beav. 559; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; and *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394; 1 Morawetz on Private Corporations, sec. 291; *In re British Seamless Paper Box Co.*, L. R. 17 Ch. Div. 471. See also the case of *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 606, cited by the learned counsel for the respondents. Assuming that these defendants were the promoters of this corporation, and it being alleged in the complaint that two of them were the officers of the corporation when the sale and purchase were made, they must be treated as the agents and trustees of the corporation, and, as such, their duties and obligations towards it are clearly defined by the authorities above cited. The learned judge, in deciding the case of *St. Louis etc. R. R. Co. v. Tiernan*, 37 Kan. 606, cites the rule of law governing their action, as laid down by the supreme court of Massachusetts in the cases of *Parker v. Nickerson*, 137 Mass. 487, and *Parker v. Nickerson*, 112 Mass. 195. In these cases the rule is stated as follows: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on the account of another what he sells on his own account; . . . and if he does so, the *cestui que trust*, or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit": See *Tyrrell v. Bank*, 10 H. L. Cas. 26; *Kimber v. Barber*, L. R. 8 Ch. 56; *Simons v. Vulcan O. & M. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628. This rule has been sanctioned and affirmed by this court: See *Puzey v. Senier*, 9 Wis. 370; *Pickett v. School Dist.*, 25 Wis. 551; *Cook v. Berlin W. M. Co.*, 43 Wis. 433; *In re Taylor Orphan Asylum*, 36 Wis. 534.

Construed as I think the allegations in this case ought to be construed upon a demurrer, they present the case of trustees and agents of the corporation selling property to the corporation on the one hand, and on the other hand buying for the corporation, and making a profit for themselves by the transaction of seventy thousand dollars. Under the rule of law above stated, the corporation may charge such profits made by the trustees and agents with an implied trust for the

benefit of the corporation, and may recover such money in an action brought by the corporation.

It is urged against this claim that at the time of the sale and purchase there were no persons interested in the corporation except the said agents and trustees themselves, and so no one was injured, as all parties then interested were fully aware of all the facts. We do not think this a true statement of the case. According to the allegations of the complaint, all the present owners of the stock were interested parties. They were in fact the corporation, and the defendants represented them in making the sale, and not merely themselves.

The relations which the defendants bore to the corporation in this case, according to the facts alleged in the complaint, are well stated by Chief Justice Thompson in the case of *Simons v. Vulcan O. & M. Co.*, 61 Pa. St. 202; 100 Am. Rep. 628. After stating that it was claimed that the organized board of directors was the company, and whatever it did could not be inquired into by the corporation put in motion by the instance of the stockholders, he says: "This is an error, and results from overlooking the fact that the directors are but the agents and trustees of the company; that they have power to act only for the interest of the company, and not against it. The share-holders constitute the company, where there is stock, and not the directors. It was therefore well put in the charge of the learned judge that the directors had no power to bind the stockholders by allowing profits to the defendants, after holding out in their prospectus that the property was obtained at original prices, and that the defendants could not claim any if they hold out that they had purchased the property for the company, and were conveying at original prices. A fraud perpetrated against the corporation by any or all of the directors may assuredly be redressed by such an action in the name of the corporation. As already said, they are its agents and trustees, which implies accountability to their principals." In the case of *In re British Seamless Paper Box Co.*, L. R. 17 Ch. Div. 471, the master of the rolls says: "I quite agree to this: that if promoters make an arrangement to get a profit for themselves out of what is apparently paid to the vendors, it is immaterial whether the contract with the vendors is approved by the directors of the company, who are the promoters, just before the allotment or just after. In both cases it is intended to cheat the future share-holders, and of course it makes no difference whatever that the persons who at the time the allot-

sel for the defendants, that, admitting the corporation would have a cause of action against the defendants for the profits made by them on the sale of the mining option to the corporation, had the corporation obtained the money with which it paid the defendants for such option in a lawful way, still, as the allegations of the complaint show that it obtained such money by an illegal issue or sale of its stock to its corporators, no action will lie to recover of the defendants any part of the money so illegally obtained by the corporation. Under my construction of the allegations of the complaint, it is very clear that the fact that the corporation received the money which paid the defendants for their mining option upon an illegal issue of its stock cannot be a defense to this action to compel them to refund to the company so much of the purchase price as was unlawfully received by them on such sale. The basis of the argument of the learned counsel is, that these defendants received the money of the stockholders upon this alleged illegal sale of the stock as the agents of the corporation, and that, as such agents, they cannot be made to account to their principal for the money so received by them upon such illegal sales.

Admitting this to be a true statement of the facts alleged in the complaint, I think, under the decisions of this and many other courts, these agents cannot set up the illegality of the transactions as a defense to an action by the principal to recover the money of its agents. I think, however, that the allegations in the complaint show that the money received on the sale of the stock was in the possession of the corporation, and not merely in the possession of its agents, and being so in the possession of the corporation, the defendants and agents of the corporation paid it over to themselves as the consideration for their mining option. Under the allegations of the complaint, they are not refusing to account for money collected by them as agents of the corporation in making sales of its stock, but they are refusing to account for money wrongfully obtained from the corporation upon a sale of their mining option to the company. Having changed their position in regard to this money by receiving it from the corporation as payment for the mining option sold to the company, they cannot now claim to hold it as money received by them as the agents of the corporation in making illegal sales of the stock of the corporation. The money paid to the corporation on such an illegal issue or sale of stock was, notwithstanding

such illegal sale, the money of the corporation as against all the world. The purchasers of such illegally issued stock could not recover back the money paid by them to the corporation upon such illegal transaction: See *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 661, 665; and if they cannot recover it back from the corporation, no one else can. The corporation, having the possession of the money, is for all practical purposes the owner of it; and if these defendants took the money from the corporation in an illegal and fraudulent way, it is no defense to such illegal act that the corporation obtained the money by a violation of the statute in selling its stock. If A obtains the title and possession of property from B by some fraudulent device, and C obtains the same property of A by fraud, and A brings an action against C to recover the property back, or for damages for the fraud, it would be no defense for C that A had fraudulently obtained it from B. This would certainly be so, unless B made a claim for the property against C. In this case the persons whose money came to the possession of the corporation cannot enforce any claim to it as against the corporation, and consequently they could not enforce a claim to it as against the persons to whom the corporation transferred it; and if the present stockholders were instrumental in bringing this action in the name of the corporation, as they must be held to be, by bringing it in the name of the corporation, they affirm the right of the corporation to the money so received by it. By what rule of law have the defendants the right to challenge the title of the corporation to the money which was paid to them upon the sale of their mining option to the corporation? I am unable to perceive any such right, especially in a case of this kind, where no other person can claim the money.

If it should be urged that the allegations of the complaint show that there are no legal stockholders, and no legal stock issued, and so no corporation which can maintain this action, it is answered by saying that the defendants are in no position to attack either the issue of the stock or the legality of the organization of the corporation. These defendants, who were the active agents in the formation of the corporation, who were instrumental in the issue of the alleged illegal stock, and who contracted with the corporation, having full knowledge of all of its transactions, are in no position to contest the regularity of the formation of the corporation: 2 Morawetz on Private Corporations, secs. 750-754, and the numerous cases cited in the

notes; *Chubb v. Upton*, 95 U. S. 665, 667; *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 60; *People v. La Rue*, 67 Cal. 526.

In my view of the case, these defendants, as agents and trustees of the corporation, sold their mining option to the corporation, and received from the corporation seventy thousand dollars in money of the corporation more than in law and equity they were entitled to receive therefor; and in law and equity they hold this money in trust for the corporation from which they received it. That the defendants, after having obtained from the corporation its money, which, in accordance with the principles of equity, they have no right to retain, may now refuse to refund on the allegation that the corporation was not in all respects organized in accordance with law, seems to me a proposition wholly unsupported by authority, and contrary to justice and equity. Under a proper construction of the allegations of the complaint, the illegal issue of the stock by the corporation, and the receipt of the money for such stock, was a completed transaction before the acts upon which the corporation rely for a recovery against the defendants transpired; and so the illegal act is in no way the foundation of the action. Briefly, the foundation of the claim of the plaintiff is this: The corporation having in its possession ninety thousand dollars, the defendants, as agents and trustees of the corporation, sold their mining claim to the corporation for ninety thousand dollars, and, acting for the corporation, they bought it for the corporation, and paid out its money to complete the purchase; and in making such sale and purchase they so conducted themselves that they were and are not entitled, as against the corporation, to retain the profits made on the sale, but hold such profits in trust for the corporation. Under such circumstances, it appears to me wholly immaterial how the corporation became possessed of the money received by the defendants, unless they can show that some other person or party has a better claim to such money than the corporation.

I have not discussed the question as to the right of the corporation to recover the money on the theory that they collected the same as the agents of the corporation, for the benefit of the corporation, and now hold it as such agents, because it seems to me that a fair construction of the allegations of the complaint do not show that such is the position of the defendants. If, under the allegations of the complaint, these defendants ever held this money as the agents of the corporation, they

abandoned that position when they received it from the corporation as the purchase price of their mining option; and if they are entitled to hold the money at all, they must hold it as vendors of such option, and as the purchase-money thereof; and if they cannot, according to the rules of law and equity, hold it as such purchase-money, then they must return it to the corporation. They cannot now assume to hold it as the agents of the corporation. In receiving the money as the purchase price of their option, they abandoned their position as agents of the corporation, if they ever were such as to this money, and cannot now assume such agency to defeat a recovery: *Fox v. Cash*, 11 Pa. St. 207; 2 Benjamin on Sales, 681.

We think the complaint states a good cause of action in favor of the plaintiff, and that the circuit court erred in sustaining the demurrer to the complaint.

The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

ESTOPPEL TO DENY CORPORATE EXISTENCE. — As to estoppel to deny corporate existence by contracting with the corporation, see note to *Schloss v. Montgomery T. Co.*, 13 Am. St. Rep. 55; note to *New York F. Ins. Co. v. Ely*, 13 Am. Dec. 108, 109; *Searcy v. Yarnell*, 49 Ark. 267; *Winget v. Quincy etc. Ass'n*, 128 Ill. 67; *Boake v. Gulf Ice Co.*, 24 Fla. 551.

PROMOTERS OF CORPORATIONS, AND THEIR RELATIONS THEREUNTO. — In the note to *Moore & H. H. Co. v. Towers H. Co.*, 13 Am. St. Rep. 23, the question of the liability of a corporation for contracts entered into by its promoters was considered, and the following conclusions were announced as sustained by the authorities upon that subject: 1. That, as a general rule, a corporation cannot be bound by acts done or promises made in its name or on its behalf before it is in existence, and, therefore, that its promoters have no authority to act or contract for it, nor in its name; *Penn. Match Co. v. Hapgood*, 141 Mass. 145; *Abbott v. Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193; 2. That while contracts made in the name or for the benefit of a corporation before its organization are not binding upon it, yet it may adopt or ratify them either in express terms or by implication, as by acting upon them and receiving the benefits thereof, and when it does so, it is either bound by its express contract, or upon the ground of estoppel not permitted to deny the validity of such contract, nor to refuse to discharge the obligations thereby imposed: *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621; 59 Am. Rep. 852; *Gooday v. Colchester & S. V. R'y Co.*, 15 L. R. 596; *Preston v. Liverpool & M. N. J. R'y*, L. R. 7 Eq. 124; *Wood v. Wheelen*, 93 Ill. 153; *Edwards v. Grand Junction R'y Co.*, 1 Mylne & C. 650; 7 Sim. 337; 6 L. J., N. S., Ch. 47; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439. It is true that some of the authorities upon this subject deny that it is possible for a corporation to ratify a contract made before its organization, because, they say, the ratification of a contract makes it valid and binding from its inception, and that no contract as against a corporation can be deemed to have an inception or existence before it was possible for the corporation to do any act or enter into

any contract: *Abbott v. Haygood*, 150 Mass. 248; 15 Am. St. Rep. 193; *In re Express Engineering Co.*, L. R. 16 Ch. Div. 125; *Kelner v. Baxter*, L. R. 2 Com. P. 175; *Gunn v. London Ins. Co.*, 12 Com. B., N. S., 694; *Melhado v. Porto Alegre R'y*, L. R. 9 Com. P. 503. The effect of these latter decisions, as we understand them, is to affirm that when a contract made by promoters in the name of a corporation is acted upon, and its benefit accepted by the corporation after its organization, this should be regarded, not as a ratification of the old contract, which the corporation had no capacity to make, but as an entering into a new contract of the same purport as the old one.

A contract may be made in the company or corporate name, either by persons who have undertaken to form a corporation and suppose they have succeeded in so doing, or by persons who know that they have not formed a corporation, but who intend doing so, and who use the corporate name in anticipation of the subsequent formation of a corporation of that name, and with the intention that the contract shall be used for the benefit of and be binding upon such corporation. In either case, the corporation cannot be bound by the contract when made; for the corporation does not then exist, and may never be called into being. It therefore follows that the contract must be treated either as binding upon the persons who have improperly used a corporate name, or as having no effect whatever. The authorities upon this subject are not harmonious. If a corporation *de facto* enters into contracts with third persons, both are often estopped from denying its corporate existence, and its capacity to make the contract in question. In such cases the question of the due incorporation is often immaterial. If, however, persons are made defendants in the action, either as partners, or as individuals jointly or jointly and severally liable on a contract, and seek to escape liability on the ground that the contract was not made with them, but with a corporation of which they were members or stockholders, they must, according to many of the authorities, show, not a *de facto* corporation merely, but one which was in being at the time of the making of the contract in question, and it will not be regarded as so in being unless every statutory prerequisite to its formation had been substantially complied with. Persons acting or contracting in a company or corporate name have usually, therefore, been held liable either as partners or as joint actors or contractors: *Garnett v. Richardson*, 35 Ark. 144; *Bartholomew v. Bentley*, 1 Ohio St. 37; *Hurt v. Salisbury*, 55 Mo. 310; *Hopcroft v. Parker*, 16 L. T., N. S., 561; *Kelner v. Baxter*, L. R. 2 Com. P. 174; *Hess v. Werts*, 4 Serg. & R. 356; *Hill v. Beach*, 12 N. J. Eq. 31; *Abbott v. Omaha Smelting etc. Co.*, 4 Neb. 416; *Baton v. Walker*, 76 Mich. 579; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Bigelow v. Gregory*, 73 Ill. 197; *Pettie v. Atkins*, 60 Ill. 453; though in some instances, where the individual liability of such persons has been maintained, their liability as partners has been denied: *Johnson v. Corser*, 34 Minn. 355.

On the other hand, there are several well-considered cases maintaining that when one has accepted a contract, executed in a corporate name, and apparently as a corporate act, he will not be permitted to deny the existence of the corporation, and to claim that its members or stockholders are personally liable on such contract, as partners or otherwise, if he knew that they did not intend to enter into any personal contract, or to bind themselves otherwise than as members or stockholders of such corporation: *Planters' & M. Bank v. Padgett*, 69 Ga. 159; *Merchants' & Mfg. Bank v. Stone*, 38 Mich. 779; *Fay v. Noble*, 7 Cush. 188; *Blanchard v. Kaul*, 44 Cal. 440; *Trowbridge v. Scudder*, 11 Cush. 83. It is doubtless true, as suggested in these decisions, that when persons accept a

contract which they then believe and intend to be with a corporation, the members or stockholders of the supposed corporation cannot be held liable, as partners or otherwise, without giving to the contract an effect which no one supposed or intended it to have when made. It is, however, equally indisputable that all of the parties intended the contract to have some effect and to be obligatory upon somebody; and that, in many instances, to prevent a failure of justice, the courts must be driven to holding the persons acting as a corporation, when none existed, as bound in the only capacity in which they had power to transact business, to wit, as partners, or at least as parties jointly liable on the contracts made in a corporate name.

The only case falling within our observation considering the rights of promoters of a corporation under a contract made by them in the name of a corporation which they intended to form is that of *Abbott v. Hapgood*, 150 Mass. 248; 15 Am. St. Rep. 193. In that case, it appeared that the promoters, in the corporate name, entered into a contract with certain persons whereby such persons agreed to furnish certain machines, which were designed for the use of the corporation when it should be formed. The corporation was subsequently formed, but the parties who contracted to furnish the machines failed to do so, and were sued by the corporation to recover damages arising from such failure. The corporation was defeated in this action, on the ground that the contract was not made with it, nor while it had any existence. The promoters then brought an action upon the same contract. In this latter action it was determined, — 1. That the judgment in the former action did not preclude a recovery; and 2. That the promoters were entitled to recover upon the contract; that in such recovery they were not restricted to the damages which they had suffered independently of their partnership association, but were entitled to all damages for which any recovery might be had for the breach of the contract; and that, in estimating the damages, the jury was entitled to consider the fact that the machines were contracted for in order that they might be turned over to and used by the intended corporation; and that, because of the defendant's failure to furnish the machines, the new corporation could not start in its work under favorable auspices, and with an equipment suitable for the transaction of a profitable business.

The relation of promoters to the corporation and to one another has been more frequently judicially considered and determined in England than in these United States. The word "promoter" has acquired a special significance in the former country, which is thus explained in *St. Louis etc. R'y Co. v. Tiernan*, 37 Kan. 623: "This word, 'promoter,' had its origin in the methods by which joint-stock companies were formed in England, where, by law, they were declared partnerships. Subsequently, when the era of railroad-building began in that country, the business of promoting the organization of such companies assumed definite form. The ordinary proceeding was this: The promoter introduced the enterprise to the notice of persons of wealth in the locality through which the line of the road was proposed to be located, informing them of its nature and prospects, and furnishing an estimate of its probable cost. These persons were solicited to aid, by their influence or subscriptions, or both. Enough persons were secured to constitute a provisional committee, and then this committee appointed from their number a managing committee, which issued a prospectus, announcing the nature and probable profits of the scheme, the proposed means to carry it out, the amount of capital required, the number and price of shares, and other details, to which were generally attached the names of the promoters, with ref-

erence to the names of those persons constituting the provisional committees. If all this resulted in fair probabilities of success, application was then made to Parliament for a bill of incorporation. If the scheme failed, the expenses incurred gave rise to litigation, and many questions as to the liability of these committees, and of the promoters, were determined. If the corporation was secured by the action of Parliament, then another class of questions arose, as to what acts of the promoters could be ratified by and what acts resulted to the benefit of the incorporation, and many others, growing out of the condition of affairs, that have no resemblance to our method of organizing corporations. It is true that the word has been found to have its uses in our jurisprudence, but in a much more restricted sense than that used in the English reports."

Both in England and in the United States, promoters have been said to occupy a fiduciary relation towards one another, and towards the company or corporation whose organization they seek to promote. An examination of all the cases in which contracts with or purchases from promoters have been set aside, or in which promoters have been compelled to account for profits received, or to restore stock issued to them without payment, or upon terms not open to other stockholders, will reveal the fact that the action of the promoters has been tainted with fraud, either in the assertion of facts known to be false, or in the concealment of facts the knowledge of which they knew would deter persons from participating in the corporation on the terms proposed, or in resorting to some device through which the agents or managers of the corporation were prevented from exercising an impartial and intelligent judgment in its behalf, to the advantage of its promoters. The only principle of law necessarily resulting from the decisions is, that the promoters must act in good faith with one another and with the corporation, and such special advantages or profits as they reserve to themselves must not be secret. In other words, they will not be permitted to assert, either expressly or by necessary implication, that they are forming a corporation upon terms which give them no special profits or advantages, while in fact they are intending to reap benefits of which their fellow-promoters, or subsequent subscribers, have no notice.

In *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218, 39 L. T., N. S., 269, 26 Week. Rep. 65 (also reported as *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. App. 73; 25 Week. Rep. 436), it appeared that a leasehold interest in the island of Sombrero had been purchased for fifty-five thousand pounds by a syndicate, acting for themselves alone, and not as the representatives of any corporation existing or proposed. Soon afterwards, they determined to form a joint-stock company, to which their leasehold should be sold for one hundred and ten thousand pounds, or double the price paid by them therefor. The memorandum of association stated that the object of the company was the purchasing, leasing, and working of mines or quarries of phosphate of lime in the island of Sombrero. The promoters named certain reputable persons as directors, whom they knew could not participate in determining whether the contract of purchase should be accepted by the new company or not, or who did not appear to know anything about the matters upon which they were required to act. While the number of directors might be as great as seven, two were sufficient to constitute a quorum. At a meeting of the directors, the contract of purchase was approved. Four directors participated in this meeting, two of whom were not shown to have any knowledge of the business; the third was the vendor of the property, and the fourth was a solicitor, who had been a member of

the syndicate. Of this ratification of the purchase, the lord chancellor remarked: "It was the duty of the promoters to take care that the contract for the purchase of their property was submitted to the intelligent consideration of a complete number of independent directors; and I cannot but regard a meeting at which one who did attend and take part in the deliberations was at once a person buying and selling, where the legal adviser present and assisting was virtually another vendor, and where the two remaining directors are not shown to have had the means of exercising, or to have exercised, any intelligent judgment, as little else than a mockery and a delusion." All the judges concurred in the conclusion that the contract of sale was one which, on prompt application, should have been set aside; but the minority were of the opinion that relief ought to be denied, on the ground of laches in applying therefor. The lord chancellor thus described the position and duties of promoters: "In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the company; and it is now necessary that I should state to your lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence, and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive; that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company, and then sell his property to it, but I do say that if he does, he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." Lord O'Hagan, referring to the same subject, expressed a similar opinion, as follows: "The original purchase of the island of Sombrero was perfectly legitimate; and it was not less so because the object of the purchasers was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction. The law permitted them to take that course, and provided the machinery by which the transfer of their interest might be equitably and beneficially effected for themselves and those with whom they meant to deal. But the privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future shareholders. The power to nominate a directorate is manifestly capable of great abuse, and may involve, in the misuse of it, very evil consequences to multitudes of people who have little capacity to guard themselves. Such a power may or may not have been wisely permitted to exist. I venture to have doubts upon the point. It tempts too much to fraudulent contrivance and mischievous deception; and, at least, it should be watched with jealousy, and restrained from employment in such a way as to mislead the ignorant

and the unwary. In all such cases the directorate nominated by the promoters should stand between them and the public, with such independence and intelligence that they may be expected to deal fairly, impartially, and with adequate knowledge in the affairs submitted to their control. If they have not those qualities, they are unworthy of trust. They are the betrayers and not the guardians of the company they govern, and their acts should not receive the sanction of a court of justice."

As suggested in the preceding quotations, there is no doubt that the owner or owners of property may cause a corporation to be formed for the purpose of purchasing it, and may sell it at any price which the corporation, when formed, can be induced to pay, regardless of the profits which may be realized on the transaction. They are not, because of their participation in the formation of a corporation, under any obligation to sell their property to it at cost price, nor are they inhibited from dealing with the corporation. Their sale to it, no matter what profits they realize therefrom, is not invalid, and cannot be set aside, provided they acted openly and fairly, and did not, substantially, act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former: *McElhenny's Appeal*, 61 Pa. St. 188; *Denmore Oil Co. v. Denmore*, 63 Pa. St. 43; *Foss v. Harbottle*, 2 Hare, 489; *Lungren v. Penwell*, 13 Cent. L. J. 211; 10 Week. Not. Cas. 297. So if, when the company or corporation is formed, certain allotments of property or stock are given to some of its promoters with the knowledge and consent of the others, and there is no intention to have any stock put on the market, or to induce any other person to become interested, any one who subsequently obtains shares, with the knowledge of the bonus given to some of the promoters, cannot sustain an action to set it aside: *In re British Seamless Paper Box Co.*, L. R. 17 Ch. Div. 467. A stipulation in the articles of association that a certain sum shall be paid to the promoters is valid, and binds persons subsequently taking shares, for the reason that it cannot operate as a fraud upon them when they knew, or by the inspection of the articles might have known, of the stipulation in question: *Ex parte Williams*, *In re Madrid Bank*, L. R. 2 Eq. 216; 35 L. J. Ch. 474; 14 Week. Rep. 706; 14 L. T., N. S., 456.

If, on the other hand, the formation of a corporation is a scheme to defraud those who may become interested in it, by causing the purchase of property which is, or should be, known to be worthless, the promoters who participate therein, and even their solicitors, may be decreed to repay the entire purchase price: *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. 394; 24 Week. Rep. 580; 46 L. J. Ch. 661.

When persons once become promoters of a corporation, or hold themselves out to the public as such, their relation to one another and to the corporation becomes very much like that of co-tenants or partners, or of agents and principals. They may, until the contrary appears, be presumed to be acting for the common benefit of their fellow-promoters, and of such persons as may become subscribers for shares of stock in the corporation, and they are, in effect, understood as representing themselves to be acting for the corporation or for their fellow-promoters in any business which they conduct, in which the corporation has or is to have an interest. If the property which they wish the corporation to acquire is theirs, their interest in it should be disclosed; if they are to receive a bonus in stock or other property, that fact should be made known. Otherwise, their fellow-promoters, and those who subsequently acquire interests in the corporation, have the right to assume that they have not been representing any interest adverse to that of the cor-

poration; and on discovering that such is not the case, a suit may be maintained to set aside any purchase from them, or to recover profits realized by them therefrom, or to compel them to account for any bonus or special advantage received by them over the other stockholders: *Bagnall v. Carlton*, L. R. 6 Ch. 371; *Beck v. Kantorowicz*, 3 Kay & J. 230; *Kent v. Freehold Land & B. Co.*, 17 L. T., N. S., 77.

A very familiar form of attempting to realize secret profits out of the formation of a corporation is that of having the property transferred to some one, who becomes the apparent owner thereof, with the understanding that if the property is sold to the corporation, all of the purchase price above a specified sum shall go to persons who have been active in its formation. If the scheme proves so far successful that the property is transferred to the corporation, and the purchase price paid, the sale may be set aside, or the persons receiving the profits may be required to account therefor: *Whaley Bridge Calico Co. v. Green*, L. R. 5 Q. B. 109.

If two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by the associates, when in truth the purchase is for a less sum, and he has received the difference between the two sums, no doubt he may be compelled to account for such difference, though the property may be worth all that was paid for it. The same principle applies as against promoters of corporations. Hence, if any of them has a secret contract for the purchase of property, the terms of which are more favorable than those disclosed by him, or an agreement that he shall have stock in the corporation without paying therefor, any advantage which he thereby obtains is a fraud on the other shareholders and upon the corporation, and he will not be permitted to retain it: *Emery v. Parrott*, 107 Mass. 95; and the principal case; *McElhenny's Appeal*, 61 Pa. St. 188; *Denmore Oil Co. v. Denmore*, 64 Pa. St. 43; *Short v. Stevenson*, 63 Pa. St. 95; *Simons v. Vulcan Oil & M. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Getty v. Devlin*, 54 N. Y. 403; 70 N. Y. 504; *Chaldler v. Bacon*, 30 Fed. Rep. 538; *Atwood v. Merryweather*, 37 L. J. Ch. 35; *Society of Practical Knowledge v. Abbott*, 2 Beav. 559.

Promoters of a corporation who are seeking to obtain secret profits out of transactions with or sales to it generally, in furtherance of their schemes, either become members of its board of directors, or procure others to become such members, who are devoted to their interests, and cognizant of their intended frauds. Where this is the case, the fact that after the organization of the corporation the board of trustees so composed adopts or ratifies the fraudulent contract or purchase, creates no impediment to proceedings in the courts for redress: *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218; 39 L. T., N. S., 269; 26 Week. Rep. 65; *Simons v. Vulcan Oil & M. Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; and even if some or a major portion of the shareholders decline to take any action, this will not preclude a recovery by another shareholder, who proceeds on his own account: *Atwood v. Merryweather*, 37 L. J. Ch. 35.

The authorities already cited establish that the wrong done by promoters may be regarded either as a wrong to the corporation or to the stockholders therein, whether they became such before or after the transaction complained of, if they acted in innocence of the fraud with which it was tainted. Redress may therefore be had either at the suit of the corporation or any of its shareholders. If the suit is by the corporation, it may be either for the purpose of setting aside the purchase or other transaction, or, without setting

it aside, the profits thereof may be recovered, or if stock has been issued without payment, or if any other bonus has been improperly received, the suit may be to recover the stock or other bonus, or to compel payment for the stock at the price at which it was authorized to be issued. If the suit is by an individual share-holder, of course his recovery must be limited to the amount of his individual injury, and this must be either the additional sum which he has paid for his stock over and above what he would have been required to pay for it but for the secret and fraudulent transaction or bonus of which he complains, or the additional profits to which he would become entitled, if the defendants were compelled to account to the corporation for the bonus or profits improperly received by them.

TURNER v. IRON CHIEF MINING COMPANY.

[74 WISCONSIN, 356.]

NOTE PAYABLE ON DEMAND, WITH INTEREST, is not a continuing security on which an indorser remains liable until actual demand; but, to charge the indorser, payment must be demanded of the maker within a reasonable time, and notice of such demand and of non-payment given to the indorser.

DEMAND NOTE — UNREASONABLE DELAY IN PRESENTING FOR PAYMENT. —

A delay of ten months after the indorsement of a note payable on demand, with interest, to present the note for payment, is such unreasonable delay that it, as a matter of law, releases the indorser.

William H. Timlin, for the appellant.

Williams, Friend, and Bright, for the respondent.

CASSODAY, J. From the undisputed evidence, it appears that the demand of payment and notice of protest were made and given more than ten months after the transfer and indorsement of the note. The law is well settled that a promissory note payable on demand, whether with or without interest, is due forthwith, and an action thereon against the maker is barred by the statute of limitations, if not brought within the time prescribed by statute after its date: *Wheeler v. Warner*, 47 N. Y. 519; 7 Am. Rep. 478; *Howland v. Edmonds*, 24 N. Y. 307; *Burnham v. Allen*, 1 Gray, 496; *Sylvester v. Crapo*, 15 Pick. 92; *Taylor's Adm'rs v. Witman's Adm'rs*, 3 Grant Cas. 138; *Larason v. Lambert*, 12 N. J. L. 247; *Curran v. Witter*, 68 Wis. 16; 60 Am. Rep. 827; *Schriber v. Richmond*, 73 Wis. 12; *Mitchell v. Easton*, 37 Minn. 335; *Hill v. Henry*, 17 Ohio, 9; *Caldwell v. Rodman*, 5 Jones, 139; *Wilks v. Robinson*, 3 Rich. 182. The mere fact that such note is payable at a particular place does not even make it necessary to allege or prove that it was so presented before the commencement of the action:

Dougherty v. Western Bank, 13 Ga. 287. This being so, it necessarily follows that the note in question became due and payable immediately upon its inception, and that, upon its transfer and indorsement, Moore, Benjamin, & Co. might immediately have maintained an action thereon against the maker corporation, without any demand whatever. Two questions are thus suggested: Was it necessary for that firm to demand payment and give notice of non-payment in order to charge Henry M. Benjamin as indorser thereon? And if so, was he discharged by the delay in making such demand and giving such notice?

It has been held in New York, and perhaps elsewhere, that an "indorsed promissory note payable on demand, with interest, is a continuing security, on which the indorser will remain liable until an actual demand, and upon which the holder is not chargeable with neglect for omitting to make demand within any particular time": *Merritt v. Todd*, 23 N. Y. 28; 80 Am. Dec. 243. But much of the reasoning in that case seems to have been disapproved by subsequent cases in the same court: *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461; *Wheeler v. Warner*, 47 N. Y. 519; 7 Am. Rep. 487; *Pardee v. Fish*, 60 N. Y. 266; 19 Am. Rep. 176; *Crim v. Starkweather*, 88 N. Y. 339; 42 Am. Rep. 250; *Parker v. Stroud*, 98 N. Y. 379; 50 Am. Rep. 685; *Shutts v. Fingar*, 100 N. Y. 541; 53 Am. Rep. 231. The case of *Merritt v. Todd*, 23 N. Y. 28, 80 Am. Dec. 243, has been expressly repudiated in Louisiana, where it is held that "a demand note must be protested and notice given within a reasonable time to hold an indorser; and the fact that the indorsement was for accommodation, and that the note bears interest, makes no difference": *Thielman v. Gueble*, 32 La. Ann. 260; 36 Am. Rep. 267. This ruling seems to be in harmony with the current of authority in this country, as appears from the valuable notes by Mr. Freeman in 80 Am. Dec. 250-254. Among the cases supporting this view may be cited *Furman v. Haskin*, 2 Caines, 372; *Sice v. Cunningham*, 1 Cow. 397; *Field v. Nickerson*, 13 Mass. 131; *Seaver v. Lincoln*, 21 Pick. 267. The ordinary contract of an indorser of a note is to pay the same, if the maker does not, on presentation at maturity, in case he is duly notified: *Charles v. Denis*, 42 Wis. 57; 24 Am. Rep. 383; *Sumner v. Bowen*, 2 Wis. 524; *Cullin v. Jones*, 1 Pinn. 130. The only difference between such a case and the case at bar is, that here the note was due before the indorsement was made. It is substantially the same

as a note payable at a fixed time, and then indorsed by the payee after maturity. The rule seems to be firmly established that, in order to charge such an indorser after maturity with liability, payment must be demanded of the maker within a reasonable time thereafter, and in case of failure to pay, notice thereof must thereupon be given to the indorser: *Berry v. Robinson*, 9 Johns. 121; 6 Am. Dec. 267; *Poole v. Tolleson*, 1 McCord, 199; 10 Am. Dec. 663; *Ecfert v. Des Coudres*, 1 Mill Const. 69; 12 Am. Dec. 609; *Nash v. Harrington*, 2 Aiken, 9; 16 Am. Dec. 672; *Colt v. Barnard*, 18 Pick. 260; 29 Am. Dec. 584; *Kirkpatrick v. McCullough*, 3 Humph. 171; 39 Am. Dec. 158; *Gray v. Bell*, 2 Rich. 67; 44 Am. Dec. 277; *Leavitt v. Putnam*, 3 N. Y. 494; 53 Am. Dec. 322; *Mudd v. Harper*, 1 Md. 110; 54 Am. Dec. 644; *Bassenhorst v. Wilby*, 45 Ohio St. 333. This court has frequently sanctioned this doctrine: *Corwith v. Morrison*, 1 Pinn. 489; *Lindsey v. McClelland*, 18 Wis. 481; 86 Am. Dec. 786; *Gunn v. Madigan*, 28 Wis. 164.

The cases cited also firmly establish the rule that where, as here, the material facts are admitted or not in dispute, the question as to what constitutes a reasonable time for making such demand and giving such notice is one of law for the court. We are all clearly of the opinion that the delay in making the demand and giving the notice in the case at bar was unreasonable, and hence that the court properly directed a verdict in favor of the defendant, Henry M. Benjamin.

The judgment of the circuit court is affirmed.

NEGOTIABLE INSTRUMENTS — DEMAND NOTES. — Notes payable upon demand may be sued on immediately after they are given: *O'Neil v. Magner*, 81 Cal. 631; 15 Am. St. Rep. 88; without any further demand than the mere bringing of the suit: *Cousins v. Partridge*, 79 Cal. 224. The statute of limitations, as to promissory notes payable upon demand, runs immediately from their date of execution: *O'Neil v. Magner*, 81 Cal. 631; 15 Am. St. Rep. 88, and cases cited in note. But see *Seward v. Hayden*, 160 Mass. 158; 15 Am. St. Rep. 183. For a general discussion of the law respecting notes payable upon demand, see note to *Merritt v. Todd*, 80 Am. Dec. 250-254. Bank checks and bills of exchange in which no time of payment is named are payable upon demand: *Parker v. Reddick*, 65 Miss. 242; 7 Am. St. Rep. 646. A draft payable upon demand is due on the date of its acceptance, or as soon thereafter as demand for payment can reasonably be made: *Kampmann v. Williams*, 70 Tex. 568. In the case of notes payable upon demand or at sight, the sight which the maker has at the time the note is made is not sufficient, but a distinct and subsequent presentment and demand must be made: Note to *Merritt v. Todd*, 80 Am. Dec. 251; and such demand must be made within a reasonable time; and what is a reasonable time is a question of law depending upon the peculiar circumstances of each particular case: *Id.*; *Parker v. Reddick*, 65 Miss. 242; 7 Am. St. Rep. 646; *Bassenhorst v. Wilby*, 45 Ohio St. 333.

LIEBSCHER v. KRAUS.

[74 WISCONSIN, 387.]

NOTE OF CORPORATION, WHAT IS. — Promissory note commencing with "we promise to pay," and signed "San Pedro Mining and Milling Company, F. Kraus, President," is the note of the company only, and parol evidence is not admissible to prove that the president did not sign the name of the company, but did sign his own name as a joint maker.

Frank J. Lenicheck and J. C. McKenney, for the appellant.

Winkler, Flanders, Smith, Bottum, and Vilas, for the respondent.

ORTON, J. This action was brought on the following promissory note:—

"\$637.40.

MILWAUKEE, January 1, 1887.

"Ninety days after date, we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

"SAN PEDRO MINING AND MILLING COMPANY.

"F. KRAUS, President."

The plaintiff demands judgment on this note against both the corporation and Frederick Kraus, as joint makers. The defendant Kraus answered that he signed the note for the said San Pedro Mining and Milling Company, as its president, and not otherwise, and that his signature was placed upon said note for the purpose of showing who executed the same on behalf of said company, and as a part of the corporation signature to the note, and for no other purpose. The plaintiff offered to prove on the trial, substantially, that Kraus did not sign the name of the company, but signed his own name as a joint maker, intending to bind himself, and that this was according to the understanding of the parties at the time. This offer was rejected, and a verdict in favor of Kraus was directed by the court. This evidence is admissible only on the ground that there is an ambiguity in the signatures to the note. If, in the law, this signing imports that both the company and Kraus are jointly bound, or that only the company is bound, there is no ambiguity, and parol evidence to alter or vary this effect is inadmissible. But if, in the law, such signing imports only that both are bound, or that the company only is bound, according to the facts and circumstances in explanation of it and the intention or understanding of the

parties, then there is an ambiguity, and the evidence was proper.

The contention of the learned counsel of the appellant that this signing imports that both are bound is inconsistent with the offer of such evidence. The learned counsel of the appellant has expressed, in his brief, the true principle, as follows: "As to the question of parol evidence, the rule of law is, that such evidence cannot be admitted to vary the terms of a contract, or to show contrary intention than that disclosed by the instrument, unless there is an ambiguity." This has been often decided to be the law by this court: *Foster v. Clifford*, 44 Wis. 569; 28 Am. Rep. 603; *Cooper v. Cleghorn*, 50 Wis. 113; *Hubbard v. Marshall*, 50 Wis. 322; *Gillmann v. Henry*, 53 Wis. 470.

There appears to be an inconsistency in cases where it is first held that such a note *ipso facto* binds the person who signed it with his official name, and yet that parol evidence might be given to make it certain: *Heffner v. Brownell*, 70 Iowa, 591. This case is mentioned as the only one in which it has been decided that such signing binds the person as well as the corporation; but there would seem to be somewhat of an ambiguity in the opinion. In *Bean v. Pioneer Mining Co.*, 66 Cal. 451, 56 Am. Rep. 106, it seems to have been decided that a similar note bound the company alone, but that parol evidence was proper to explain it. No case is cited, and I can find none, where it has been decided squarely that such a note bound both the company and the person whose name appears below with the name of his office or agency, or bound the company alone, except the case of *Chase v. Pattberg*, 12 Daly, 171, where the note was, "We promise to pay," etc. "[Signed] English S. M. Co. H. Pattberg, Manager"; and it was decided that the company was not bound, but that Pattberg was. The authorities are generally the other way. In *Draper v. Massachusetts Steam Heating Co.*, 5 Allen, 338, the note was, "We promise to pay," etc. "[Signed] Massachusetts Steam Heating Company. L. S. Fuller, Treasurer." In *Castle v. Belfast Foundry Co.*, 72 Me. 167, it was, "We promise to pay," etc., "at office Belfast Foundry Company [Signed] Belfast Foundry Company. W. W. Castle, President." In *Falk v. Moebs*, 127 U. S. 597, it was, "We promise to pay," etc., "to the order of Geo. Moebs, Sec. & Treas., at," etc. "[Signed] Peninsular Cigar Co. Geo. Moebs, Sec. & Treas.," and indorsed, "Geo. Moebs, Sec. & Treas." These notes were

held to be unambiguous, and not explainable by parol evidence, and the notes of the companies alone.

Many other cases of similar signing are found in the above cases and in the text-books. See also Mechem on Agency, sec. 439; 1 Randolph on Commercial Paper, 188; 1 Daniel on Negotiable Instruments, secs. 299-305; *Gillet v. Newmarket Savings Bank*, 7 Brad. App. 499; *Scanlan v. Keith*, 102 Ill. 634; 40 Am. Rep. 624; *Latham v. Houston Flour Mills*, 68 Tex. 127; Story on Agency, sec. 154; Parsons on Notes and Bills, 312. The question comes very near, if not quite, having been decided by this court in *Houghton v. First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107, where it is held that an indorsement on a note not belonging to the bank by "Geo. Buckley, Cas.," he being cashier of the bank, bound the bank, and not himself. In *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120, it is held that a note signed by "J. H. Sidmore, Cash.," bound the bank alone. In *Rockwell v. Elkhorn Bank*, 13 Wis. 653, where the bank promises to pay in the body of the note, and it is signed only by "D. D. Spencer, Cashier," it was held that the bank only was bound.

The principle of these authorities seems to be "that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound." Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word "president" to his own name, he shows conclusively that, as president of the corporation, he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix "cashier," "secretary," "president," or "agent" to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word "by" or "per" or "pro" would not add to the certainty of what is thus expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus as its president. The circuit court properly rejected

the offer of parol proof, and correctly instructed the jury to find a verdict in favor of Kraus.

The judgment of the circuit court is affirmed.

CORPORATIONS—CONTRACTS OF, MADE BY AGENTS.—An agreement under seal, made by the president of a corporation, reciting that it was made between "B., of the first part," and "E. L., president of N. D. Co., of the second part," and subscribed "N. D. Co., by E. L., President," binds the corporation as a valid contract made by it: *Northwestern D. Co. v. Brant*, 69 Ill. 658; 18 Am. Rep. 631. Compare *Tarver v. Garlington*, 27 S. C. 107; 13 Am. St. Rep. 623, and note; *Bean v. Pioneer M. Co.*, 66 Cal. 451; 56 Am. Rep. 106, and foot-note; *Hefron v. Pollard*, 73 Tex. 96; 15 Am. St. Rep. 764, and note.

IN RE GRAHAM. IN RE McDONALD.

[47 WISCONSIN, 450.]

JUDGMENT SENTENCING A PRISONER FOR A LONGER TIME THAN STATUTE WARRANTS is erroneous, but not void, and he is not entitled to be discharged on *habeas corpus*.

ON HABEAS CORPUS, ONLY JURISDICTIONAL DEFECTS are available, and not mere errors of the court. Hence one who, after conviction, was sentenced for a longer period than the law warrants will not be released upon *habeas corpus*.

Cole and O'Keefe, for the petitioners.

COLE, C. J. The petitioners were charged on an information, in substance, of willfully and feloniously making an assault upon one Robert McDonald, and putting him in bodily fear and danger of life, and feloniously robbing him of two hundred dollars in money, such petitioners being each armed with a dangerous weapon, namely, a loaded revolver, him, the said Robert McDonald, did wound and strike and rob, etc. The petitioners were convicted of the offense as charged, and Graham was sentenced to imprisonment in the state prison for the period of thirteen years, and McDonald for the period of fourteen years. The information was doubtless based upon section 4375, Revised Statutes, which seems to apply to the offense of which they were charged. The judgments were doubtless intended to be under that section. The section provides that the guilty party "shall be punished by imprisonment in the state prison, not more than ten years, nor less than three years." The sentence is in excess of the period fixed by statute, and writs of *habeas corpus* are applied for upon that ground.

We deny the writs, for the reason that the error in the judg-

ments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of *habeas corpus*. The judgments are doubtless erroneous, and would be reversed on writ of error: *Fitzgerald v. State*, 4 Wis. 395; *Haney v. State*, 5 Wis. 529; *Benedict v. State*, 12 Wis. 314; *Peglow v. State*, 12 Wis. 534. But the judgments are not void: *State ex rel. Welch v. Sloan*, 65 Wis. 647. The court had jurisdiction of the persons and subject-matter or offense, but made a mistake in the judgment. For mere error, no matter how flagrant, the remedy is not by *habeas corpus*. The law is well settled in this court that on *habeas corpus* only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings: *In re Crandall*, 34 Wis. 177; *In re Pierce*, 44 Wis. 444. On the petitions presented, the writs would be unavailing, if granted. They are therefore denied: *In re Semler*, 41 Wis. 517; *Wright v. Wright*, 74 Wis. 439.

Writs denied.

HABEAS CORPUS. — As to what errors and defects can be raised under a writ of *habeas corpus*: *Ex parte Sternes*, 77 Cal. 156; 11 Am. St. Rep. 251, and note; note to *Commonwealth v. Lecky*, 26 Am. Dec. 40-46.

CITY OF OSHKOSH v. MILWAUKEE AND LAKE WINNEBAGO RAILROAD COMPANY.

[74 WISCONSIN, 534.]

RAILROAD — INJUNCTION. — **MANDATORY INJUNCTION MAY ISSUE TO COMPEL A RAILWAY CORPORATION** to put in suitable condition for travel a public highway which has been rendered practically unfit for use by the construction of a railway track, and an embankment on which track rests; and the fact that the city might itself do the work, and recover the expenses thereof from the railway corporation, will not prevent the issuing of the writ.

Charles W. Felker, D. S. Wegg, and Howard Morris, for the appellant.

M. H. Eaton and H. B. Jackson, for the respondent.

COLE, C. J. This case, in principle, is ruled by the decision in *Jamestown v. Chicago etc. R. R. Co.*, 69 Wis. 648. In that case, this court sustained a bill brought by the town to compel the railroad company to restore a public highway, which it had practically destroyed in constructing its road, to its former condition of usefulness for public travel. The jurisdic-

tion of the court was rested upon the ground that a court of equity would compel a railroad corporation to perform the plain statutory duty of restoring the highway which it had invaded to its former state of usefulness, as a condition to using it for the purposes of its road-bed. This duty is imposed by statute in plain and positive language, and a railroad corporation has no warrant in law to invade a highway with its track without complying with the law which grants the privilege for it to do so. It is contumacious and wrongful conduct for the officers of a railroad corporation to occupy a public highway with its track, practically destroying the street for purposes of public travel, and then defy or disregard all law and all authority invoked to compel them to repair the wrong which they had done the public. The courts would be impotent indeed if they could not correct such flagrant invasions of public right.

The legislature has seen fit to authorize a railroad company to construct its track across and along a highway, subject to the express condition that it restore the highway to its former state of usefulness, or that it does not materially impair the highway for public travel, and maintains it in that condition afterwards. But the duty to restore and keep in repair is coupled with the privilege to use and occupy the highway for its track; and if the corporation will not perform its duty, it should not enjoy the easement granted. These considerations are in accord with the most obvious principles of justice and public rights.

The slightest attention to the facts stated in the complaint will convince any one that the defendant company has very materially impaired and injured Division Street by the manner it has built its track therein. In constructing its road in that street, it is alleged that it has obstructed the same by raising an embankment in the street in many places eighteen inches high above the grade as it was before the road-bed was built, and in other places varying from that height to a few inches, and maintains such embankment at that elevation above the grade. It is alleged that it is impracticable to drive over the railroad track between one end of a long block and another; that it is impossible to turn with an ordinary team and vehicle upon the street, or to drive in and out of the lots and premises along the street with teams and heavy loads. In view of these facts, it is idle to allege or say that the street has not been nearly destroyed by the construction of the rail-

road therein; certainly, its usefulness as a public street has been materially impaired. The railroad company has refused, though requested by the officers of the city, to put the street in a condition for public use as a highway. These, with other facts stated, present a case for the exercise of the jurisdiction of a court of equity, by way of mandatory injunction, to compel the railroad company to perform its duty, within the doctrine of the Jamestown case.

It is said the court should not exercise its extraordinary powers by way of mandatory injunction to compel the railroad company to restore the street for public use, because the city itself may do the work, and recover the expense of doing it of the company. Such an objection surely comes with bad grace from the railroad company, insisting that it should not be compelled to restore the street, because the city has power to do the work which the statute requires it should do. The acts of the railroad company constitute a nuisance, for it has no authority to use the street for its road-bed without restoring it to its former condition. It is no excuse for its default to say that the city may make it suitable for public use. The railroad company should either abandon the street for the use of its track, or restore things to their former condition, as the statute requires.

It is said, before the city calls on the railroad company to restore the street, it should establish a permanent grade thereof. But it is no concern of the company whether the city has established the grade of the street or not. Its duty is to repair the injury it has done the highway. When the company has restored, as near as possible, Division Street to its former state of usefulness, it will have fulfilled the condition upon which it has the right to occupy it with its track. A mandatory injunction would seem to be the only adequate remedy to redress the wrong to the public rights, and is fully warranted by the facts stated in the complaint.

The order of the circuit court overruling the demurrer to the complaint is affirmed, and the cause remanded for further proceedings according to law.

RAILROAD COMPANIES — HIGHWAYS. — The right of a railroad company to interfere with a highway is coupled with the duty to make it as safe as it was before the interference: *Note to Palatka etc. R. R. Co. v. State*, 11 Am. St. Rep. 404; and it is proper to compel a railroad company by a writ of mandatory injunction to perform its duty with respect to highways disturbed by it: *Jamestown v. Chicago etc. R. R. Co.*, 69 Wis. 648.

McKINNON v. VOLLMAR.

[75 WISCONSIN, 82.]

ACTION FOR MONEY HAD AND RECEIVED IS THE PROPER REMEDY TO RECOVER THE CONSIDERATION PAID by the plaintiff to the defendant for a conveyance of land, if the circumstances are such that the plaintiff has the right to rescind the sale, and has done everything on his part necessary to such rescission.

RESCISSION BECAUSE WRONG LANDS WERE POINTED OUT. — If intending purchasers are proceeding, as they suppose, to examine land offered for sale, and an agent of the vendors causes a wrong tract to be pointed out, and a purchase is thereby induced, the vendees have a right to rescind the sale, and recover the purchase-money, though the vendors were not aware of the fraud of their agent in pointing out the wrong land.

SUBAGENT — RIGHT OF AGENT TO APPOINT. — An agent may appoint a sub-agent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, and which are purely executive or ministerial, and the principal is bound by the acts of such agent. Therefore, if the duty of agent is to point out land which the principal desires to sell, and a subagent, selected by the agent, directs a third person to point out lands which the subagent knows are not the lands of the principal, the latter is bound by the wrongful act of the subagent, and must restore the consideration paid for the conveyance of the land, when such consideration was paid under the belief that the lands conveyed were the same as those pointed out.

RESCISSION OF SALE FOR MISREPRESENTATION. — If a vendor represents that a tract of land contains a specified large quantity of pine timber, when in fact it has upon it little or no timber, the vendee is entitled to rescind the sale, if the circumstances of the case excused him for not verifying the accuracy of the statement, though the vendor believed it to be true.

ACTION for money had and received. At the trial, it appeared that the defendants were the owners of a two-hundred-acre tract of land, which they had purchased in 1884, upon the faith of the sworn statement of one Greeves and one Goodwin, that they had personally examined the land, and found thereon two million two hundred thousand feet of pine. The defendants, after their purchase, authorized one Seibert to sell the land for them, and he thereupon opened a correspondence with the plaintiffs. After several letters had passed, one of the plaintiffs went personally to have an interview with Seibert and the defendants. The defendants showed the estimates of pine on their land before mentioned, and they also asserted that there were at least two million feet of pine timber thereon. One of the plaintiffs started in company with Greeves to examine the land. Before they reached the land, they were joined by one Kirwin, whom Greeves hired, and whom he sent to point out the land, but Kirwin not being personally acquainted with the land, Greeves in-

structed him to show a particular parcel of land which Greeves knew was not the land owned by the defendants, and which they were seeking to sell. Kirwin innocently did as he was directed by Greeves, and showed a tract of land about one mile distant from the defendants' land, and heavily timbered with pine. The plaintiffs, believing the land shown them was that belonging to the defendants, agreed to purchase it for the sum of eighteen hundred dollars, and subsequently paid the entire purchase-money, and received a conveyance. Shortly after the making of this conveyance, the plaintiffs discovered the fraud which had been practiced upon them, and executed and tendered a reconveyance to the defendants of the land conveyed by them, and demanded the return of the purchase price. The jury to whom the case was submitted specially found that Seibert employed Greeves to show the land; that Greeves thereupon employed Martin Kirwin; that Kirwin showed lands other than those actually sold by defendants to plaintiffs; that the plaintiffs, acting on the faith of the information received from Kirwin, purchased the lands; that Kirwin, in what he did, acted by mistake, and that Greeves directed Kirwin to show the wrong lands, and that the plaintiffs purchased the lands believing that they were the same lands shown to them by Kirwin, and that the defendants had made a statement to plaintiffs before the sale as to how much pine timber there was on the land, on which statement the plaintiffs relied in making the purchase; that the correct description of the lands was furnished plaintiffs before they went to examine them; that there was no pine timber thereon, and that the sale of the lands was made under a mistake on the part both of plaintiffs and defendants; that plaintiffs had been shown the wrong lands. Judgment was entered in favor of the plaintiffs upon the verdict, and the defendants thereupon appealed.

Cato, Jones, and Sanborn, for the appellants.

Jenkins and Jenkins, for the respondents.

LYON, J. 1. At the close of plaintiffs' testimony, the defendants moved for a nonsuit. The motion was denied. This ruling is claimed to be erroneous for the alleged reason that the only remedy of the plaintiffs is by a suit in equity, and that, under the facts of the case, an action for money had and received, to recover the consideration paid for the land,

cannot be maintained. The reason thus assigned is unsound. It might be otherwise were this an action to rescind a conveyance of land, or to compel the execution of one. But this is not such an action. The only conveyance involved has already been rescinded, so far as the plaintiffs could rescind it, by the tender to the defendants of a sufficient conveyance of the land in question, and the deposit of such conveyance in court for the defendants. The plaintiffs have done all they can do to place the parties *in statu quo*; and all the defendants have to do to accomplish that result is to accept such conveyance and refund the purchase-money. There is nothing in the case which calls for the exercise of the peculiar and extraordinary jurisdiction of a court of equity. The controlling question in the case is, whether the defendants ought to refund the consideration they received for the land. If they ought, such consideration can be recovered in an action for money had and received: *Ela v. American M. U. Ex. Co.*, 29 Wis. 611; 9 Am. Rep. 619. We conclude, therefore, that if the plaintiffs are entitled to recover such consideration, they may recover the same in this form of action.

2. We now proceed to consider whether the findings of the jury are supported by the testimony. That there is sufficient testimony to support most of the findings is too clear for argument. A few of them only may be open to some doubt as to whether the testimony sustains them. These will be briefly noticed.

The sixth and seventh findings are to the effect that Greeves directed Kirwin to show Derfus the wrong land, and that he did so by mistake; that is to say, in the belief that he was showing defendants' land. The finding is not that Greeves was mistaken in that particular, and it is quite evident, from the testimony, that he was not. In this view of the findings, they are supported by the testimony.

The thirteenth finding is, that there is no pine timber on the lands sold by defendants to plaintiffs. This manifestly means no merchantable pine timber. There is considerable testimony that such is the fact.

The fourteenth finding is, that the purchase and sale of the land was made under a mistake on the part of all the parties, in that they supposed Derfus had been shown the land conveyed by defendants to McKinnon and Redmond. It seems to us that this is the unavoidable inference from all the testimony. It certainly was a mistake on the part of plaintiffs;

and if not so on the part of defendants, it was something worse. It is proper to say, however, in this connection, that the evidence casts no imputation of actual fraud upon the defendants. It contains no suggestion that they knew, when they made the conveyance and received the consideration, that the wrong lands had been shown Derfus; and they are not to be censured because they refuse to refund the consideration until their liability to do so shall be determined judicially.

Our conclusion on this branch of the case is, that all of the material findings are supported by the testimony.

3. The only remaining question to be determined is, Do the facts found by the jury, and the undisputed facts not so found, support the judgment?

We understand the law of this case to be, that if the wrong land was pointed out to Derfus, whether intentionally or not, by an agent of the defendants, and the plaintiffs purchased believing that the right land had been shown Derfus, they may recover back the consideration paid therefor, although the defendants did not know, when the consideration was paid, that Derfus had been shown the wrong land, and although they made no representation to the purchasers of the amount of pine on the land; but if the person so showing the land was not the agent of the defendants, all other circumstances being as above supposed, the defendants are not liable in this action. This is the doctrine of *Law v. Grant*, 37 Wis. 548. Hence it becomes important to ascertain whether the person who showed Derfus the wrong land was or was not the agent of the defendants in that behalf.

The jury did not find that Seibert was the agent of defendants to sell their land, but the undisputed evidence establishes the fact that he was. The jury found that Seibert employed Greeves to show Derfus the land. Was Greeves the agent of the defendants? The answer depends upon the question of Seibert's authority to employ a subagent for that purpose.

The rule is, that an agent in whom is reposed some trust or confidence in the performance of his agency, or who is required to exercise therein discretion or judgment, has no authority to intrust the performance of those duties to another, and thus bind the principal for the acts of the latter, without the consent of his principal. Numerous cases illustrating this rule will be found cited in 1 Am. & Eng. Ency. of Law, 368, note 4. On the other hand, an agent may appoint a subagent

to do acts in the course of the agency which do not call for the exercise of judgment or discretion, but which are purely executive or ministerial, and the principal is bound by the acts of such subagent: *Renwick v. Bancroft*, 56 Iowa, 527; *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271; Ewell's *Evans on Agency*, *43, and cases there cited.

In this case, the showing of the land to Derfus was a mere executive or ministerial act, requiring no exercise of judgment or discretion, and it was therefore entirely competent for Seibert to employ Greeves to perform it. It may be observed here that the defendants knew that Greeves had been selected by Seibert to show Derfus the land, and made no objection thereto. Indeed, it seemed to be a very proper appointment, for Greeves had been upon the land, and estimated the timber thereon, and of course knew the location thereof, while it does not appear that Seibert ever saw the land. For the above reasons, it must be held that Greeves was the agent of the defendants for the purpose of showing the lands to Derfus, and the defendants are responsible for the manner in which he performed the duties of such agency.

Greeves did not in person point out the land to Derfus, but he did so just as effectually as though he had gone upon the land in person and told Derfus that it was the defendants' land, for the purchase of which he was negotiating. He told Kirwin what particular tract of land he was to show Derfus, and Kirwin showed him such tract as he was directed to do. Thus Kirwin was the mere instrument of Greeves, and his act in thus pointing out the land was, in substance and legal effect, the act of Greeves, the agent of the defendants. Hence there is no question in the case as to whether Kirwin was or was not the agent of the defendants in what he did. Literally obeying the orders of Greeves, as he did, his acts were the acts of Greeves. An agent who, because of the trust and confidence reposed in him by his principal, cannot bind his principal by the acts of a subagent may still employ another to do some specific act in the business of his agency, and if such other do that act as directed, the principal is liable, not because the person performing the act is his agent, but because the act is the act of his agent who directed it to be done.

It follows, from the foregoing views, that the defendants are liable for the act of their agent in thus showing Derfus the wrong land, although he did so through the instrumentality of Kirwin.

4. But the judgment may be upheld on another ground. The jury found that the defendants made a statement to Derfus before the sale as to how much pine timber there was on the land, that the plaintiffs relied upon such statement in making the purchase, and that the same was false. The only statement on that subject mentioned in the testimony is, that there were at least two million feet of pine timber on the land; hence it must be inferred that this is the statement which the jury found was made by the defendants to Derfus. Under the circumstances of the case, the plaintiffs are excusable for not verifying the accuracy of such statement by actual inspection of the land; and under the above finding, without regard to the question of agency, the plaintiffs are entitled to recover. And it is quite immaterial that the defendants did not know at the time that such statement was false: *Miner v. Medbury*, 6 Wis. 295.

The judgment of the circuit court is affirmed.

AGENCY — RIGHT TO APPOINT SUBAGENT. — An agent may delegate his powers to a subagent, when they do not require the exercise of discretion or judgment: *Sayre v. Nichols*, 7 Cal. 535; 68 Am. Dec. 280; *Lyon v. Jerome*, 26 Wend. 435; 37 Am. Dec. 271.

CONTRACTS — FALSE REPRESENTATIONS — FRAUD. — False representations as to material matters constitute a defense to an action upon a contract, even though their falsity was unknown to the party making them: *Note to Chat-ham F. Co. v. Moffatt*, 9 Am. St. Rep. 730; *Davis v. Nuzum*, 72 Wis. 439; *Labbe v. Corbett*, 69 Tex. 503; *Ingalls v. Miller*, 121 Ind. 188; *Chase's Appeal*, 57 Conn. 237; *Holcomb v. Noble*, 69 Mich. 396.

VENDOR AND VENDEE — CONTRACTS FOR SALE OF REALTY — RESCISSION. — Where a vendee is entitled to rescind a contract for the sale of land by reason of the vendor's fault, he may sue in *assumpsit*, and recover the money already paid to the vendor: *Wright v. Dickinson*, 67 Mich. 580; 11 Am. St. Rep. 602, and note; and to the same effect, substantially, is *Ingalls v. Miller*, 121 Ind. 188.

**CRONKHITE v. TRAVELERS INSURANCE COMPANY OF
HARTFORD, CONNECTICUT.**

[75 WISCONSIN, 116.]

INSURANCE AGAINST ACCIDENT — PRESUMPTION OF CAUSE OF INJURIES. —

Upon proof being made to the effect that the decedent, who was insured against death by accident, appeared at his home with marks of extreme violence visible upon his back, which seemed to have been inflicted recently, and from which he subsequently died, the presumption should be indulged that such injuries were not self-inflicted, nor caused by the negligence of the insured, but were the result of accident.

INSURANCE AGAINST ACCIDENT — BURDEN OF PROOF. — If it appears that the assured died from injuries received by him, the insurer must assume the burden of proving that such injuries resulted from some cause against which he did not insure, or that there had been some breach of some condition or agreement in the policy on account of which he is relieved from liability.

ACTION upon a policy of accident insurance issued to the plaintiff's deceased husband insuring him against loss of time or death "resulting from bodily injuries inflicted during the term of his insurance through external violence and accidental means." Among the conditions and agreements indorsed upon the policy were the following: "3. This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there are no visible marks upon the body; nor accident, nor death, nor of loss of limb or of sight, nor disability, resulting, wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or afflicted: Disease or bodily infirmity, hernia, fits, vertigo, or sleep-walking, medical or surgical treatment (amputation necessitated solely by injuries, and made within ninety days of the occurrence of accident, excepted), intoxication or narcotics, taking poison, or contact with poisonous substances, inhaling gas, sunstroke or freezing, dueling or fighting, war or riot, intentional injuries (inflicted by the insured or by any other person), voluntary over-exertion, wrestling, lifting, racing, gymnastics, violating law, voluntary exposure to unnecessary danger." It appearing, at the trial, that the only evidence which the plaintiff would be able to offer was to the effect that decedent was a conductor on a railroad; that he left his home to make a regular trip on the 17th of September, 1887, and returned on the 19th of the same month; that at the time of his return there were marks of extreme violence upon his back, apparently recently inflicted, and that these injuries were, in the opinion of physicians, sufficient to produce death. The

court thereupon ruled that from such evidence no presumption could arise that the plaintiff was entitled to recover, but that she must proceed further to show that the injuries were the result of accident by proving the manner in which they were inflicted, or the cause of them. A judgment of nonsuit having been granted, the plaintiff appealed.

Synon and Frost, for the appellant.

Cate, Jones, and Sanborn, for the respondent.

LYON, J. We think the court took an erroneous view of the law. Unless the injuries which are alleged to have caused the death of the insured were intentionally self-inflicted, or intentionally inflicted by some other person, or were received in dueling or fighting (in which case they would be intentional), the legal presumption is that they were accidental. No presumption can be indulged that the law has been violated, as it would have been were the injuries intentionally inflicted by another. On the contrary, the presumption is that they were not. Hence, had the plaintiff proved only that the insured, at a certain time, had upon his person bruises and wounds evidencing that he had been recently injured by external violence, and, further, that such injuries caused his death, she would have made out a *prima facie* case of death resulting from bodily injuries, "through external, violent, and accidental means." Were it claimed that the injuries were self-inflicted or were caused by the negligence of the insured, until such self-infliction or negligence should be affirmatively proved the same presumption of accident would prevail: *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Travelers Ins. Co. v. McConkey*, 127 U. S. 661; *Freeman v. Travelers Ins. Co.*, 144 Mass. 572; *Peck v. Equitable etc. Ass'n*, 59 Hun, 255. In the opinions in the above cases will be found citations of numerous other cases holding the same doctrine.

Neither is there any presumption that the injuries which it is claimed caused the death of the insured resulted from any of the causes not covered by the policy, as specified in paragraph 3 of "agreements and conditions" indorsed upon it. The stipulations therein are not conditions precedent, and are not inserted in the body of the policy. They are separate provisos, qualifying the general words in the policy. It was held in *Redman v. Aetna Ins. Co.*, 49 Wis. 431, that in such case, if anything contained in the provisos will defeat the action, it is matter of defense. See also *May v. Buckeye Mut.*

Ins. Co., 25 Wis. 291; 3 Am. Rep. 76. True, these cases arose upon policies insuring against loss or damage by fire; but the principle is equally applicable to a life or accident policy.

Should the plaintiff, on another trial, make the proof which she offered to make, and show due notice and proof to the defendant of the injuries and death of the insured, as required by one of the conditions indorsed upon the policy, she will be entitled to judgment, unless the company prove that the injuries resulted from some or one of the causes specified in said paragraph 3.

The foregoing views are fully sustained by the supreme court of Massachusetts in *Coburn v. Travelers Ins. Co.*, 145 Mass. 226, which was an action against the present defendant on a policy in all essential particulars like that here in suit.

For the reasons above suggested, we think the nonsuit was erroneously ordered.

Judgment reversed, and the cause remanded for a new trial.

ACCIDENT INSURANCE — PRESUMPTION AS TO INJURIES RECEIVED. — Where the evidence shows that the insured died either from accident or by suicide, the presumption is against suicide: *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410, and particularly note. And a clause in a policy requiring direct and positive proof that death of the insured was caused by external violence and accidental means is inoperative; for courts will not permit the course of justice upon a trial before them to be stipulated and contracted in such a manner as to change the rules of evidence: *Utter v. Travelers Ins. Co.*, 65 Mich. 545; 8 Am. St. Rep. 913, and note 921-924.

CENTRAL LITHOGRAPHING AND ENGRAVING COMPANY v. MOORE.

[75 WISCONSIN, 170.]

CONTRACT, WHETHER FOR SALE OR MANUFACTURE. — A contract to manufacture certain engravings and lithographs for theatrical purposes, to be taken and paid for during the succeeding theatrical season, is not a contract of sale, but one for the manufacture of goods merely; and the engravings and lithographs, when manufactured, become the property of the person who contracted for them, and if they are burned before delivery to him, he must bear the loss, and cannot successfully resist an action to recover the contract price of the work.

REMEDY FOR NOT ACCEPTING GOODS MANUFACTURED. — One who employs another to manufacture goods or to construct machinery, but who fails or refuses to call for or accept such goods or machinery, when completed and set aside for him, is liable to an action for not accepting as he agreed to do.

ESTOPPEL FROM INSURING GOODS. — The fact that one employed to manufacture certain goods after they were completed insured them as his own, and when they were subsequently destroyed by fire, collected the amount for which they were insured, does not estop him, in an action against the person who employed him, from insisting that they were the property of such employer, nor from recovering the price agreed to be paid for their manufacture, less the amount realized from the insurance.

Jackson and Thompson, for the appellant.

Weisbrod, Harshaw, and Nevitt, for the respondent.

ORTON, J. By two certain written agreements, one dated September 15, and the other November 2, 1885, the plaintiff agreed to manufacture a large quantity of engravings and lithographs for theatrical purposes, for the defendant, and for his special use, to be taken and paid for during the theatrical season of 1885–86, and all of the work was to be completed and ready for delivery by the fifteenth day of December, 1885. A large portion of the goods was taken and paid for during the theatrical season above stated, and the remainder was ready for delivery by the fifteenth day of December, 1885, and during that theatrical season, and was not called or paid for until it was burned up, on the twenty-sixth day of May, 1886, on the premises of the plaintiff, where it was piled up and set apart for the defendant. The plaintiff had procured insurance on this remainder of the work, and received part of what was due on the contracts, for the loss, from the insurance company. This suit is brought to recover the balance unpaid. The jury found that the plaintiff had manufactured the goods ready for delivery at the time fixed in the contract, and had them ready for delivery at all times thereafter until the fire occurred, and that the hand-colored proofs under one contract, and the quality of the paper under the other, were accepted by the defendant as sufficient, and that he also accepted a part of all the different kinds of work, and paid for the same, during the theatrical season, and that the theatrical season ended on the first or fifth day of May, 1886. The only ambiguity in the contracts was as to when the theatrical season ended or was to end, and that the jury has supplied, and we think on sufficient evidence, by the last above finding.

The jury found, also, that it was agreed and understood that the title of the property should pass to the defendant the fifteenth day of December, 1885, the time the work should be finished, and that manufacturing the goods and setting them

apart subject to the defendant's order it was mutually understood should be delivery to the defendant. These two findings dispose of questions of law which depend upon the meaning, construction, and legal effect of the written contracts, and they ought not to have been submitted to the jury. But the court sufficiently ruled the same way, by refusing to set the same aside and to grant a new trial, and the verdict of the jury in this respect has done no harm.

The learned counsel on both sides, and the court below, treated this transaction as a sale of personal property. It was not a sale. When the contracts were entered into there was nothing *in solido* to be the subject of a sale. The mere paper, as the basis of this valuable work of mechanical art, was not only of insignificant value, but was not the subject of sale. The defendant did not wish to buy blank paper, and the plaintiff had none to sell. The plaintiff was to manufacture these engravings and lithographs for the especial, peculiar, and exclusive use of the defendant in his business as a theatrical manager. They were advertisements adapted to the names and characters of his theatrical performances. It was the plaintiff's work of skill that gave the property produced by it any value. It was work and labor performed according to the order and direction of the defendant, and according to the terms of the contracts. When the required works were produced and ready to be taken away by the defendant and paid for, it was then not a sale. The plaintiff did not own them, and did not wish to own them; for they were of no use or value whatever to him, and were only of use and value to the defendant. When the job was completed according to the contracts, then the defendant was under legal obligation to take them away and pay the amount agreed upon, during the theatrical season which ended May 5, 1886. If he does not do this, what are the legal rights of the parties? Is there any question about delivery or acceptance? Clearly not. It makes no difference with the plaintiff whether the defendant takes them away or not; for he is entitled to be paid for the job, or for his work, according to the contracts. The contracts are, that the works shall be paid for "as they are delivered"; that is, as they are delivered during the theatrical season of 1885-86. After that, the money is due at all events. The defendant is liable, because he has not accepted the work and taken it away and paid for it, according to the contracts. It is not even property out of which the plaintiff could reimburse

himself; for it is of no value to him or to any one else except the defendant. How long must the plaintiff wait? The money is due, and he may sue for it. These are, especially, contracts for work and labor of this peculiar kind, and the transaction is more clearly not a sale than almost any other, where the new thing is produced by work and labor for another. For in such cases the article produced is generally of some considerable value to the mechanic, or it may be sold in the market. But not so here. But the contracts themselves call it work and labor. In both, it is, that the "party of the first part agrees to lithograph, in a workmanlike manner, for the party of the second part, the following described work." They provide that the party of the first part shall print, engrave, and lithograph for the other party the various kinds of work. The plaintiff is stated to be lithographers, wood-engravers, printers, and binders.

These contracts may be likened to a job that a printer does for another, and according to his directions, when the work consists of handbills or advertisements set up in attractive form, and adapted exclusively to the business of such other person, and useful to no one else. The job is completed according to contract, and the other party has failed to take them away and pay for them. May not the printer sue? Or an artist paints the likeness of another, according to contract. It is not called for, but left a long time on the artist's hands. The work was well done, and acceptable to the person who ordered it. It is of no use to the artist, or of any value to any one except to him whose likeness or picture it represents. In all these cases, it is too clear for argument that the transaction is not governed by the law of sales, but of work and labor. In these supposed cases, if the handbills and advertisements in the one case, and the likeness in the other, after the time for taking them away and paying for them had expired, are burned up, whose loss is it? They are put by themselves in a safe place until called for. Why should the printer or the artist lose by the fire, and the person who ordered the work done, and who is in default in not taking it away and paying for it, and by whose negligence it was left with the artist, where it was burned without his fault, suffer no loss? The law works no such injustice. These cases are alike in principle. They are clearly analogous.

The defendant, by his own default and neglect, left his engravings and lithographs with the plaintiff, and under his

care and custody, as a naked bailee, for some time after the time he agreed to take them away and pay for them, and they were burned. They were piled together and set apart for the defendant in a safe place, and he had accepted the work as being according to the contract. There can be no doubt, as we have said already, that the plaintiff had an action for the money agreed to be paid, after the time for payment had expired. In that view, the fact that the work was afterwards burned up is immaterial, unless caused by the plaintiff's negligence.

But in analogy to a sale of the property, it was left in the plaintiff's care by the fault of the defendant, and if there was any loss by fire, he must suffer it. Where several articles of the same kind were purchased, and only one taken away, and the others left with the vendor, to be called for at any time the vendee chose, the title of the property passed to the vendee at the time of the sale: *Bullis v. Borden*, 21 Wis. 139. So the title of this property passed to the defendant December 15, 1885, when it had all been manufactured according to the contracts, and part of it taken away, and after that remained with the plaintiff, or under its care, until called for, during that theatrical season. Where one had stored in a certain warehouse a large number of barrels of flour, and sold the same to another, to be paid for "when used or disposed of," a part of them had been disposed of or taken away and paid for. Most of the remaining barrels were destroyed by fire with the warehouse. It was held that the property burned belonged to the purchaser, and that he was liable at once for the price of that burned up: *Powers v. Dellinger*, 54 Wis. 389.

There is another principle of liability in such a case, and that is, that the defendant was liable for not accepting and taking away the goods manufactured, after the time he was required by the contracts to do so, as in *Ganson v. Madigan*, 15 Wis. 144; 82 Am. Dec. 659. The defendant had ordered a reaping-machining of the manufacturer, of a certain kind. The machine was what the defendant had ordered, and the plaintiff had set it apart for the defendant, so as to be capable of identification. It was held that the plaintiff could have sold the machine to satisfy his lien upon it, and recover the balance of the purchase price, or could have held it subject to the defendant's order, and recover the whole price. In *Mizer v. Howarth*, 21 Pick. 207, 32 Am. Dec. 256, where it is an agreement with a workman to put materials together and con-

struct an article for the employer at an agreed price, it was held that it was not a sale until actual delivery and acceptance, and the remedy was for not accepting it on the agreement. To the same effect are *Spencer v. Cone*, 1 Met. 283; *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112. In *Atkinson v. Bell*, 8 Barn. & C. 277, the defendant ordered certain frames, with alterations made on them, of the patentees, and when ready for delivery, refused to accept them. It was held that the plaintiff might recover for his not accepting them. To the same effect is *Lee v. Griffin*, 1 Best & S. 272, where a person ordered a set of artificial or false teeth made to fit his mouth. It was held that the plaintiff might have recovered from the defendant for his not accepting them, if the contract had been in writing; and *Mead v. Case*, 33 Barb. 202, was to the same effect, where blocks of marble were directed to be finished, polished, and lettered with inscriptions as a monument.

But, finally, on this general question, this court recently decided that a transaction or contract not by any means so clearly not so was not a sale, but for work and labor. In *Meincke v. Falk*, 55 Wis. 427, 42 Am. Rep. 722, the article to be manufactured was a family carriage, specially ordered, of a particular model. The plaintiff's skill, labor, and workmanship were the special inducement in giving the order, and without such order the plaintiff would not have manufactured it, and it was not kept as a part of his general stock. The carriage was completed according to the contract or order, and the defendant refused to accept it. The action was for the value of the carriage, and for storing it for the defendant, on the ground of non-acceptance. In that case, Mr. Justice Casaday reviewed very fully the authorities on the question, which were conceded to be somewhat in conflict. It was held that it was not a sale of the carriage, but a contract for work and labor, and that therefore the verbal contract was not within the fifty-dollar statute of frauds.

The complaint in this action was not for the price of the goods, as sold to the defendant, but the ground of the action is, that "the defendant has never ordered the same shipped, nor taken or paid for the same, or any part thereof"; in effect, that the defendant had refused to accept the same. This case, therefore, falls directly within the authorities above cited. Although the instructions of the court and the special findings of the jury were more particularly applicable to this transaction as a sale of goods, yet many of the findings are appropri-

ate to work and labor performed by the plaintiff for the defendant in producing the goods; such as, that the plaintiff manufactured the goods called for in the contracts, and in the time specified therein, and had manufactured them ready for delivery at the time specified, and at all times thereafter until the said fire, and that the defendant had accepted and paid for some of all the different kinds of the work manufactured. Two other findings, although on the question of delivery of the goods as if sold, and more as a matter of law than of fact, as legal conclusions, may not be inappropriate to the character of the transaction as for work and labor. The jury found that the title of the goods passed to the defendant on the fifteenth day of December, 1885, and that manufacturing the goods and setting them apart, subject to the defendant's order, was understood to be a delivery to him. These are just and proper conclusions in this case, treating it as one for work and labor, and not for a sale of the property. The work was subject to the order or acceptance of the defendant, and he ought to have accepted it and paid for it before the fire, and it was merely left with the plaintiff by the defendant's default and at his risk. The plaintiff merely held the work as bailee, and subject to the lien of the consideration to be paid. He had no other interest in the work.

In the above view taken of the case, the fact that the plaintiff insured the goods as nominal owner, and collected the insurance, is not material as bearing on the question of their ownership; for the plaintiff had a right to have them insured to protect its lien, and doing so as nominal owner would be no evidence that the defendant ought not to have accepted them and paid for them before the fire, and that the loss, if any, was not his loss. A vendee before he accepts the goods may insure them, and it is no evidence that he has waived his right to reject them if they are not according to the contract: *Bacon v. Eccles*, 43 Wis. 227. But the defendant ought not to complain of the insurance. It was greatly in his favor. He would have lost them altogether had not the plaintiff insured them for their mutual benefit. The goods owned by any one else than the defendant would have been of no value whatever, either for insurance or sale. The plaintiff, by his forethought and prudence, saved the defendant from a large portion of the loss which he would have been compelled to pay to the plaintiff, and lessens *pro tanto* the amount of his recovery in this action.

This opinion is much longer than it would have been if the case had been tried upon the correct theory. It would not answer to allow it to go into the reports as a sale, in contradiction of *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722. The result was warranted by the evidence, just the same, however, and the judgment is correct, and the errors assigned become immaterial.

The judgment of the circuit court is affirmed.

CONTRACT, WHETHER FOR SALE OR MANUFACTURE. — A contract for the manufacture of a carriage according a special order, at a price exceeding fifty dollars, need not be in writing, and is a contract for manufacture, not for sale: *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722.

PROPERTY, WHEN PASSES IN ARTICLES TO BE MANUFACTURED: See note to *Andrews v. Durant*, 62 Am. Dec. 65-68; note to *Moody v. Brown*, 56 Am. Dec. 642, 647.

REMEDY OF THE MANUFACTURER OF GOODS MADE TO ORDER AGAINST THE EMPLOYER, who refuses to accept them: Note to *Moody v. Brown*, 56 Am. Dec. 642-647.

WILTON v. MAYBERRY.

[75 WISCONSIN, 191.]

SUBROGATION TO RELEASED MORTGAGE. — One who advances money with which to pay off a mortgage, in pursuance of an agreement that he should do so, and that the mortgage should be discharged of record, and a new mortgage given him on the same property for the amount so advanced, is entitled to be subrogated to the mortgage, and to have the satisfaction of record set aside, and a decree foreclosing such mortgage in his favor, as against the original mortgagor and one who, with knowledge of all the facts, received a conveyance of the property.

F. L. Perrin, for the appellants.

Smith and Vannatta, for the respondent.

ORTON, J. The complaint sets out, substantially, the following facts: On or about the fifth day of November, 1881, the appellants William Mayberry and Martha, his wife, executed a mortgage on certain real estate in Pierce County, Wisconsin, to one Ann W. Grant, to secure to her the payment of one thousand dollars on the first day of July, 1887, and said mortgage was duly recorded. On the fifth day of July, 1887, said mortgage being due, the respondent loaned to said appellants the sum of \$1,005, on the agreement that with said money said mortgage should be paid and discharged of record, and that said appellants should execute to the respondent a new mort-

gage on said land, to secure said loan. This was done on the part of the respondent in mere friendship, without any selfish interest whatever. The money was used to pay off said mortgage, and it was duly discharged of record; but instead of said appellants giving the respondent such new mortgage, as they agreed to do so, and which was the inducement of said loan, they deeded said land to John R. Mayberry, one of the appellants, with intent to defraud the respondent out of his money. The said first-mentioned appellants had and have no other property. The said John R. Mayberry had full knowledge of said loan and said agreement. The respondent prays that he may be subrogated in place of the mortgagee of said first-mentioned mortgage, and that its satisfaction of record be canceled, and that it may be declared to be a good and subsisting mortgage to him, and that it be foreclosed. The appellants demurred to said complaint, on the ground that it did not state a cause of action, and the demurrer was overruled, and this appeal is from such order.

The learned counsel of the appellants contend that the respondent was a mere volunteer, and had no interest in the land to protect, and cannot therefore be subrogated as mortgagee to the mortgage paid and discharged, and cites, besides other authorities, *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63, and *Downer v. Miller*, 15 Wis. 612. In those cases it was a mere loan of money, to enable the borrower to pay off the mortgage debt, and without any agreement that the security shall be assigned or kept on foot for the benefit of the party who loaned him the money. But this is no such case. The respondent, by the agreement, was to have equal security on the land, and, to protect that interest, caused the first mortgage to be discharged. This case is ruled in principle by *Lery v. Martin*, 48 Wis. 198. It was there a part of the contract that the executors should secure the lender by another mortgage, as here, and they did so, as they supposed; but the mortgage was void for want of authority. On the same principle are *Jones v. Parker*, 51 Wis. 218, and *Carey v. Boyle*, 53 Wis. 574. This was a most outrageous fraud on the part of the appellants, and there is no other possible remedy to the respondent but subrogation. No one is injured or interested except these appellants, who committed the wrong. When they deeded the land to the other Mayberry, they supposed they had succeeded in defrauding the respondent out of his security in it; but the grantee had knowledge of the agree-

ment, and is therefore bound. It is really a strong case for equitable subrogation.

The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

MORTGAGE — SUBROGATION. — Where one advances money to pay off a mortgage, under an agreement to the effect that the mortgage should be assigned to him as security for the money advanced, and takes a discharge of the mortgage, he is nevertheless entitled to be subrogated to the rights of the mortgagee: *Fears v. Albee*, 69 Tex. 437; 5 Am. St. Rep. 78; *White v. Cannon*, 125 Ill. 412; *Henson v. Reed*, 71 Tex. 726.

POWERS v. LARGE.

[75 WISCONSIN, 424.]

PARTNERSHIP ASSETS, INDIVIDUAL CREDITOR, WHEN ESTOPPED FROM DENYING. — When two persons have held themselves out as partners, and purchased goods as such, a creditor who has held a judgment note against one of them for a long time, and who knew they were holding themselves out as partners, and buying goods as such, and who never gave notice to any of their creditors that they were his debtors, is estopped from claiming that they were not partners, and that the judgment entered on his note is entitled to precedence over a judgment subsequently levied for a partnership debt, created while the defendants in that judgment were holding themselves out as partners, and obtaining credit as such.

INTERVENTION TO PROTECT ATTACHMENT LIENS. — When goods have been sold under an execution, one who claims to have an attachment lien paramount to such execution need not resort to an independent action to enforce his lien, but may intervene in the action in which the execution issued, have his lien adjudged to be paramount, and a judgment therein entered directing the proceeds of the sale to be paid towards its satisfaction.

John D. Wilson and William E. Carter, for the appellant.

Clark and Mills, for the respondents.

ORTON, J. The findings of the court on the material questions of fact in this case are substantially as follows: In March, 1885, Frank L. Powers gave to his father, the appellant, his judgment note for \$3,240. In February, 1886, judgment was entered upon said note, and an execution was issued thereon, and levied upon a stock of goods in the possession of Frank L. Powers, as claimed by the appellant, or in possession of Powers and Stone, as claimed by the respondents. The respondents, Large and Amsden, caused an attachment to be issued against said Powers and Stone, and

to be levied on the same goods, subject to said execution, and subsequently recovered judgment against said Powers and Stone in said attachment suit, and execution was thereafter issued thereon, and returned "No property found." In the mean time, the goods were sold under the execution of the appellant, and the proceeds deposited in court, and the said respondents, by their petition as intervenors, asked that said moneys be applied to the payment of their judgment, the fund being sufficient for that purpose. It was further found that Powers and Stone both held themselves out as partners as early as October, 1885, and afterwards, and purchased goods of divers persons as such, among whom were the said respondents, and held themselves out as such partners in the ownership of said goods and business. The appellant never disclosed to any who sold said Powers and Stone goods, including the respondents, that he held said judgment note, and he knew that said Powers and Stone were holding themselves out as partners to those who sold them goods, and others, and knew the condition of said partnership, and that it was making such purchases from the respondents and others, and never disclosed to any of its customers that he held said note. The firm of Powers and Stone, and each and both of them, are insolvent, and said goods constituted their entire property. The facts are more fully stated in the petition in the case which came to this court by appeal from the order overruling the demurrer to the same, and reported in 69 Wis. 621; 2 Am. St. Rep. 767.

It is strenuously contended by the learned counsel of the appellant that these controverted facts were not proved. It would be useless to specially refer to the testimony to determine whether these findings in respect to such facts are sustained by it. It is sufficient that there was evidence to support them. The weight and credibility of such evidence the circuit court had better facilities of determining than this court can have from the mere record thereof. There was evidence that the said Powers and Stone did hold themselves out as copartners to the respondents and others, and purchased goods as such, and that the said appellant knew of it, and knew that they were generally doing business as such, and that he did not disclose to them his large personal claim against Powers alone, but allowed the respondents and others to sell them goods as copartners, without any objection, and that he stated to them at one time that they were doing business as partners,

or alluded to them as such, and that Stone had gone into the concern to strengthen it. The relationship between the appellant and Powers and Stone gives color to this evidence,— Frank Powers being the appellant's son, and Stone his son-in-law. The circuit court did not find any direct fraud in the case, for it was not necessary. But these *indicia* of fraud give force to the claim of the respondents that their attachment lien on the goods as partnership property ought to be preferred to this undisclosed claim of the appellant, the father, against Frank Powers, the son. The circuit court did not find that Powers and Stone were in fact, or as between themselves, partners, but it was found that they bought the goods of the respondents as such, and held themselves out as partners, and made purchases as such for replenishing their stock, and were, to all intents and purposes, ostensible partners, and that the appellant knew that they were thus doing business, and that they were insolvent beyond this stock of goods which he afterwards seized on execution, and that was sufficient. The conclusion from these facts is, that the appellant is estopped from denying that Powers and Stone were in fact partners as to these respondents and their partnership claim. It seems to me that the evidence makes a very strong case against the appellant, and in favor of giving preference to the respondents' lien on the goods, and of making application of the fund, or so much thereof as may be necessary, to pay their judgment.

The question whether this case in favor of the respondents is equitable, was, in effect, disposed of by this court on the former appeal. The point was then made that the respondents ought to have brought suit in equity for such relief, and this court held that such relief could as well be obtained on the petition of the intervenors in this case as by an independent action. If it would be a matter in equity in an independent action, as contended, it will be no less in equity by petition in this form. It is very clearly an equitable proceeding. It is to enforce the lien of the respondents on the goods, as partnership property, in preference to the appellant's claim against one of the individual partners. It being an equitable proceeding, the court is responsible for the findings, and may, of course, find any facts different from the jury, or set aside their verdict. The verdict is only advisory in such a case, and is not binding on the court: *Johnson v. Johnson*, 4 Wis. 135; *Gill v. Rice*, 13 Wis. 549.

The learned counsel of the respondents contend that the

judgment in their favor against Powers and Stone, as partners, on an issue of partnership, is conclusive in this case of that question. That we do not decide, as, in our opinion, the evidence sufficiently shows that they held themselves out as partners to the knowledge of the appellant, and that they contracted the debt to the respondents as such, and it is not necessary to give such effect to the judgment, if in law it has such effect.

There are no legal questions involved in the record or applicable to the case that are not familiar or disposed of on the former appeal. The case on this appeal is one of fact, and we think that the findings of the court are sustained by the evidence.

The judgment of the circuit court is affirmed.

PARTNERSHIP — CREDITORS — LIENS. — As to the liens and priorities of firm creditors over individual creditors, see note to *Powers v. Large*, 2 Am. St. Rep. 771.

INTERVENTION — WHO MAY INTERVENE, AND THE RIGHTS OF PERSONS INTERVENING: See note to *Lacroix v. Menard*, 15 Am. Dec. 162, 163; note to *Brown v. Saul*, 16 Am. Dec. 181-184.

FRISK v. REIGELMAN.

[75 WISCONSIN, 493.]

FRAUDULENT SALE. — When goods are sold for one third of their value to one who does not open the packages in which they are, nor make any examination of them, but admits that they are a bankrupt stock, and that he has purchased them at twenty per cent of their value, and who furnishes the vendor with transportation to another city, and admits his flight to parts unknown, the sale is properly adjudged fraudulent as against the vendor's creditors.

FRAUDULENT SALES. — THE FACT THAT THE VENDER HAS PAID A CONSIDERATION for goods which he claims to have purchased, while it is to be considered in determining the question of fraud, is by no means a controlling fact.

PRACTICE. — THE RECEPTION OF INCOMPETENT EVIDENCE is not a sufficient ground for reversing the judgment, when the action was tried before the court without the aid of a jury.

GARNISHMENT. — A VALID JUDGMENT AGAINST THE PRINCIPAL defendant is essential to authorize a judgment against the garnishee.

SUMMONS — CONSTRUCTIVE SERVICE OF. — If a summons is not personally served on the defendant, it is essential to the validity of the judgment against him that there was a valid order for the publication of summons and due publication thereof, and before such an order could be made, a verified complaint must have been filed.

PRACTICE — AMENDMENT BY INSERTING NAMES OF MEMBERS OF FIRM. —

If an action is brought in the name of a firm, and all the papers therein are thus entitled up to the time of the trial, the court may at any time before judgment amend the proceedings by inserting in the place of the firm name the names of the partners therein as plaintiffs.

INVALIDITY OF ATTACHMENT DOES NOT INVALIDATE THE JUDGMENT against the garnishee, if the action is one which might have been instituted and prosecuted to judgment had no attachment been attempted to be issued thereon.**PRACTICE — VERIFICATION OF COMPLAINT BY AN ATTORNEY IS SUFFICIENT** to sustain garnishment proceedings, if it appears therefrom that the attorney has read the complaint, and knows the contents thereof, and verily believes the same to be true, that the sources of his information which are the grounds of his belief were derived from statements of the plaintiffs' account and letters in reference thereto, received by him from the plaintiffs, and the reason why the complaint is not verified by one of the plaintiffs is, that none of them reside in the same county with the attorney.**PRACTICE — WHEN AN ORDER OF PUBLICATION DIRECTS THAT A SUMMONS** be published in the "Daily Leader, a newspaper published in the city of Eau Claire, county of Eau Claire," and the affidavit filed shows publication in the "Eau Claire Daily Leader, a daily newspaper printed and published at the city of Eau Claire, in said county of Eau Claire," it sufficiently appears that the summons was published in the paper designated in the order.**PRACTICE — AFFIDAVIT THAT A SUMMONS WAS PUBLISHED "SIX WEEKS SUCCESSIVELY, commencing," etc.,** does not show compliance with a statute requiring publication to be made "not less than once a week for six weeks."**PRACTICE — CORRECTED AFFIDAVIT OF THE PUBLICATION OF SUMMONS MAY BE FILED IN SUPPORT OF JUDGMENT,** where it appears that the affidavit as so corrected is true, and establishes compliance with the law and an order of the court directing the publication of such summons, and when so filed it may be transmitted to the appellate court, in which the original action or a proceeding connected therewith is pending for review.

ACTION to recover \$170.25 for goods sold and delivered by plaintiff to the defendant Bessinger. Summons issued December 19, 1887, was returned by the sheriff not served. A writ of attachment issued with the summons, under which the sheriff levied, upon a stock of goods, as the property of Bessinger, but subject to attachment levied in another action brought against him by Streissguth and Drake. Samuel Reigelman, being summoned as garnishee, answered, denying his liability as garnishee, to which answer the plaintiff took issue. The complaint in the action was verified by one of plaintiff's attorneys, and the affidavit of the same attorney was also to the effect that the defendant Bessinger had recently departed from the state, with intent to defraud his creditors

and to avoid the service of summons upon him. An order for the service of summons by publication was obtained from a court commissioner. After the time for publication was passed, judgment by default was entered for the amount of plaintiff's claim. At the trial of the issues against the garnishee, Reigelman, the court found that when the garnishee summons was served upon him, he had in his possession personal property belonging to defendant Bessinger of the value of twelve hundred dollars, and that sufficient of it remained in his hands after deducting the amount of the claim of Streissguth and Drake to pay the plaintiff's judgment. Judgment was therefore entered against the garnishee for the amount of plaintiff's judgment.

James Wickham, for the appellant.

T. F. Frawley, for the respondents.

LYON, J. 1. Numerous questions of practice are presented by this appeal, and were argued by counsel. These will be considered hereafter. It is convenient, first, to consider the case on the merits.

The *gravamen* of the garnishee action is, that Reigelman, the garnishee, purchased a stock of goods of Bessinger, the principal defendant, with the intent on the part of both of them to hinder, delay, and defraud the creditors of Bessinger. The personal property mentioned in the findings of the court is part and parcel of such stock of goods. As is usual in cases of this character, the testimony on most of the material questions involved is conflicting and irreconcilable. After a careful examination thereof, we are of the opinion that the court might properly have found therefrom the following specific facts:—

In the year 1887 Bessinger was engaged in mercantile business at Washburn. As late as the 1st of December he had a stock of goods in his store worth between three thousand and four thousand dollars. Soon thereafter, he removed a portion of his stock, of the value of about twelve hundred dollars, to Hayward, and a portion to Ashland. He sold, at Hayward, about three hundred dollars' worth of the goods taken there, and sent the remainder to Eau Claire, directed and consigned to Reigelman. He then went to Eau Claire, and negotiated a sale of the portions of his stock, both there and at Ashland, to Reigelman, for one thousand dollars. The latter made the purchase without opening the packages

containing the goods at Eau Claire, or making any examination of them, and without having seen the goods at Ashland, or any invoice of them, and without making any inquiries, except of Bessinger, as to the quantity and value of the goods. He admitted to one of the witnesses that the goods seized on the attachments were a bankrupt stock which he had purchased at Ashland; that the stock was worth three thousand dollars, and he had purchased it at twenty cents on the dollar of its value. Upon inquiry being made of him, he disclaimed knowledge of the whereabouts of Bessinger, but said he had heard he was in San Francisco. After such purchase, Reigelman furnished Bessinger transportation to St. Paul, and has not seen him since.

Reigelman placed the goods in a room adjoining his saloon, and commenced selling them at one third, or less, of their actual value. The only testimony of the consideration paid for the goods by Reigelman was given by himself, and is to the effect that he loaned Bessinger five hundred dollars in March, 1887, taking no note or other voucher therefor. He gave him the money, or most of it, in currency. In July he sent a note for the amount to Bessinger, to be executed by him, payable in four months, — that is, on November 25, 1887, — without interest. It is quite apparent that Bessinger was an entire stranger to him before 1886, and his personal intercourse with him after that time was casual and infrequent. He testifies to purchasing large quantities of cigars of Bessinger in 1887, and paying him therefor, except one thousand, which he received as interest on the five hundred dollars. His testimony as to his dealings with Bessinger is so vague and confused that it is quite insufficient to show any close business or personal relations between them. He further testifies that when he bought the goods he surrendered to Bessinger the five-hundred-dollar note, and indorsed to him a certificate of deposit for five hundred dollars, dated two days before, in payment thereof. The certificate so indorsed was produced in court.

Without going further into detail, it is sufficient to say that the transactions between Reigelman and Bessinger were so unusual — so out of the ordinary course of business — that, taken in connection with his admission that the stock which he purchased was a bankrupt stock, and was so purchased at a ruinous sacrifice, the learned circuit judge was abundantly justified in finding the sale was in fraud of the creditors of Bessinger, to the knowledge of Reigelman, and that the goods

thus purchased by the latter remained, as to such creditors, the property of Bessinger, and that Reigelman was liable to them for the value thereof. The testimony also fully supports the finding that the stock thus fraudulently purchased by Reigelman was worth at least twelve hundred dollars.

The fact that the certificate of deposit was indorsed to Bessinger is not very significant. In most cases of fraudulent sales we find evidence of the formal payment of a consideration, and often the payment is made with considerable publicity and ostentation. Of course, the payment of a consideration by the purchaser is a fact to be considered in determining the question of fraud, but it is by no means a controlling one. If it were, but few fraudulent sales could be successfully impeached, for they would be so made that the purchaser could easily prove that he paid for the property.

Many exceptions were taken on the trial to the rulings of the court admitting or rejecting testimony. It is no sufficient ground for reversing the judgment, where the case is tried without a jury, that incompetent testimony has been admitted. In such case, the appellate court will give no weight to such testimony in the determination of the appeal, but will not reverse the judgment because it was admitted. We are satisfied that, had all of the testimony rejected by the court been received, it could not have changed the result. Hence the rulings in that behalf are immaterial.

We conclude that the testimony supports the findings and judgment.

2. We are now to determine certain alleged errors and irregularities of practice in the proceedings preliminary to the judgment in the principal action, which, it is claimed, invalidate the garnishee proceeding and judgment. Before doing so, however, it should be observed that a valid judgment in the principal action against the defendant Bessinger is essential to the validity of the judgment against the garnishee, and the latter may be heard to assert the invalidity of the principal judgment: *Streissguth v. Reigelman*, 75 Wis. 212, and cases there cited.

Further, the summons not having been personally served on Bessinger, it is essential to the validity of the judgment against him that there was a valid order for publication of the summons, and due publication thereof, and that no such order could be regularly made until a verified complaint in the action had been filed.

We proceed to the consideration of the alleged errors and irregularities above mentioned.

1. The principal action was commenced in the name of "Frisk, Turner, & Co.," and all the papers therein, and in the garnishee action down to the trial of the latter action, were thus entitled. Before judgment in the garnishee action, the court made an order amending the proceedings by inserting, in place of the firm name, the names of the partners therein, as plaintiffs. Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity which is waived, unless due objection be made thereto before judgment: *Bennett v. Child*, 19 Wis. 362; 88 Am. Dec. 692. No such objection was here interposed. The amendment was properly allowed.

2. The affidavit upon which the writ of attachment issued in the principal action must depend for its validity is substantially the same as that in *Streissguth v. Reigelman*, 75 Wis. 212. The affidavit in that case was held insufficient, because the indebtedness of Bessinger was not positively stated therein. That action was brought under chapter 233, Laws of 1880 (2 Sanborn and Berryman's Ann. Stats. 1578), upon a debt not then due, and it was held that a valid attachment was essential to the maintenance of the action. Hence the judgment in the principal action was held void.

This action was brought upon a demand past due, and the right to maintain it, or to maintain a garnishee action based upon it, does not depend upon the validity of the attachment. A valid judgment in the principal action could have been rendered, and a valid garnishee proceeding could have been instituted therein and prosecuted to judgment, had no attachment been issued or attempted to be issued. The issuing of a summons is a sufficient basis for the garnishee proceeding: R. S., sec. 2753. Hence the invalidity of the attachment herein does not affect the judgment against the garnishee. It removes from the case, however, the question whether, after the plaintiffs attached the goods fraudulently purchased by Reigelman, they can maintain a garnishee proceeding against him to recover the value of such goods.

3. It is contended by counsel for the garnishee that the complaint is not properly verified, and hence the order of publication was unauthorized. The verification was made by Mr. Frawley, the attorney for the plaintiffs, who resides in Eau Claire County. It is to the effect that he is such attorney and

makes the verification in their behalf; that he has read the complaint, and knows the contents thereof, and verily believes the same to be true; that the sources of his information, which are the grounds of his belief, were derived from statements of the plaintiffs' account, and letters in reference thereto, received by him from the plaintiffs; and that the reason the complaint is not verified by one of the plaintiffs is, that none of them were then within the county of Eau Claire, in which county he resides. On the authority of *Morley v. Guild*, 13 Wis. 576, this verification must be held sufficient. The discussion of the subject in that case by Chief Justice Dixon is full and satisfactory, and we do not care to add anything to what is there said.

4. The order of publication directed that the summons be published in the "Daily Leader, a newspaper published in the city of Eau Claire, county of Eau Claire," etc. The affidavit of publication is, that the summons was published in "the Eau Claire Daily Leader, a daily newspaper printed and published at the city of Eau Claire, in said county of Eau Claire." It is claimed that the affidavit fails to show a publication in the newspaper specified in the order. We think otherwise. If there is any substantial difference between the order and affidavit of publication as to the designation of the newspaper in which the summons was ordered to be and was published, we have failed to discover it.

5. There is, however, a substantial defect in the affidavit of publication, which, if not corrected, would be fatal to the garnishee judgment. The statute (R. S., sec. 2640) requires the publication to be made "not less than once a week for six weeks." The affidavit of publication states that the same was printed and published in such newspaper "six weeks successively, commencing," etc. That this is not a compliance with the statute is freely conceded by counsel for the plaintiffs.

A motion on behalf of the plaintiffs was submitted at the argument for leave to file a corrected affidavit of publication, and it was shown that the summons was in fact published once a week for six weeks, as required by the order and the statute. The motion must be granted, and the plaintiffs have leave to supply such defect. But it should be supplied in the first instance in the court in which the action was brought and the judgment entered, so that the records of that court may show regular procedure in the action.

A corrected affidavit of publication may therefore be filed with the clerk of the circuit court, who is directed to transmit the same to this court, to be attached to the record herein. Until the receipt thereof, judgment will not be entered. It is unnecessary to return the whole record to the circuit court for the purposes of such correction. Ten dollars costs on above motion is awarded the defendant, to be deducted from the judgment.

Judgment affirmed.

SALES — FRAUD — CREDITORS. — A sale by a vendor, intending to defraud his creditors, is fraudulent and void as to the creditors, where the vendee had knowledge of the fraudulent intent: *Renninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692, and note; *Catchings v. Harcrow*, 49 Ark. 20; *Bollman v. Lucas*, 22 Neb. 796.

FRAUD — WHAT CONSTITUTES — BADGES OF FRAUD: See *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748, and note 759.

GARNISHMENT — DEFENSE OF GARNISHEE — JUDGMENT. — A garnishee may avail himself of the void character of the judgment against the principal: Note to *Hanna v. Loring*, 13 Am. Dec. 341; but see *Schneitman v. Noble*, 75 Iowa, 120; 9 Am. St. Rep. 467.

PROCESS — SERVICE BY PUBLICATION. — As to when and under what circumstances constructive summons by publication may be made upon a defendant, see *Harris v. Daugherty*, 74 Tex. 1; 15 Am. St. Rep. 812, and note; note to *Williams v. Westcott*, 14 Am. St. Rep. 296; note to *Mudge v. Steinhart*, 12 Am. St. Rep. 22; *Hahn v. Kelly*, 34 Cal. 391; 94 Am. Dec. 742.

GRAHAM v. DREUTZER.

[75 WISCONSIN, 558.]

BANKRUPTCY — NEW PROMISE, EFFECT OF, UPON JUDGMENT DISCHARGED BY.

— A judgment discharged by proceedings in bankruptcy is dead and wiped out, and a subsequent execution sale thereunder is void, though, after such discharge was granted, the debtor promised unconditionally to pay such judgment. The new promise does not, of itself, remove the bar of the discharge, and to make such promise available, some new proceeding must be taken to revive the judgment.

Turner and Timlin, for the appellant.

O. E. and Y. V. Dreutzer, for the respondent.

ORTON, J. The plaintiff, as the original owner of the land, brought this action of ejectment against the defendant in possession, holding under a sheriff's deed as purchaser at a sale of the land under execution, on a judgment in favor of Graff and Sherman against the plaintiff, rendered February 27,

1877. The plaintiff introduced his discharge in bankruptcy, dated September 14, 1885, on a petition in bankruptcy, filed August 29, 1878. The defendant then offered evidence tending to prove that the plaintiff, in 1883, promised unconditionally to pay said judgment. On the finding of these facts, the court rendered judgment dismissing the complaint, and this appeal is from said judgment.

The learned counsel of the appellant do not controvert these facts, and the learned counsel of the respondent do not seriously question the effect of the plaintiff's discharge in bankruptcy upon the said judgment. The judgment was anterior to the filing of the petition, and a provable demand. There is therefore no such question as was involved in *Leonard v. Yohnk*, 68 Wis. 587; 60 Am. Rep. 884. The objections made to the admission in evidence of the discharge were only that it did not appear that there were any bankruptcy proceedings pending; that it was not proof according to the statute; and that it was not properly authenticated. The objections did not go to the legal effect of the discharge to bar the judgment. We shall consider only the question principally discussed on the argument: Can this defense of the sheriff's deed under the judgment be made available in this action, in connection with proof of the subsequent promise?

1. We do not think that this is merely a question of pleading. Matters of title are supposed to be mainly involved in ejectment. The judgment, as the basis of the sheriff's deed, was barred, discharged, and invalidated on the record. It does not exist as the foundation of title. It was not admissible in evidence for such purpose. On objection and production of the discharge, it should have been rejected. It is *functus officio* as a judgment, — dead, and wiped out. How can it be revived? Must it not be by some direct proceeding acting upon the discharged judgment? Can it be done incidentally and collaterally in a case where it is simply offered in evidence by the mere ruling of the court on its admissibility? There should be an adjudication that the judgment be revived or re-established for some sufficient reason. Then the new or revived judgment would stand upon the record as a valid judgment, and could be introduced in evidence as such.

2. The judgment in ejectment should appear on the record to be a complete bar to another suit involving the same material issues or subject-matter. In this case, however, on the

ordinary issue in such an action, the court revives a discharged judgment by a new promise, and yet this important issue does not appear upon the record. But the judgment remains as before, discharged, and of no effect; and there is no record to the contrary in this suit or elsewhere in respect to the title in dispute. We are satisfied that the bar of the discharge in bankruptcy cannot be removed from the judgment, and the judgment revived so as to become the foundation of the defendant's title in this way. The new promise did not *ipso facto* remove the bar of the discharge, but it may be good cause for an adjudication to that effect.

The authorities on the subject are in conflict. The discharge in bankruptcy not only bars the remedy, but extinguishes the debt; and we think that some affirmative action must be taken, not only to remove the bar of the discharge, but to revive the obligation. There is a moral obligation in the original debt, as a foundation for the revival of the legal one by a new promise. That is the theory of *Maxim v. Morse*, 8 Mass. 127. The principles and practice in that case seem to be the most consistent with reason, and are in analogy to the practice in cases of a new promise to remove the bar of the statute of limitations. The suit was brought on the judgment. The defendant pleaded in bar the discharge in bankruptcy, and the plaintiff replied the new promise. The court answered the motion in arrest on the ground that the action should have been brought upon the promise and not on the judgment; that "the inconsistency is in appearance more than in reality. A good collateral fact was put in issue, on which a regular judgment may be entered in the action." In *Murphy v. Crawford*, 114 Pa. St. 496, and in *Ott v. Perry*, 1 Phila. 77, and in some other cases, it is held that the action should be brought directly on the promise, on the ground that the original debt is extinguished. That is a mere technicality. If the action is brought on the promise, the judgment must nevertheless be brought into the case as the foundation or consideration to support the promise; and in either case there is a new judgment. The practice in Massachusetts is the better one, as it is in harmony with that in cases of the statute of limitations, well established in this state and elsewhere. But, whether the action should be brought on the judgment or promise, the courts agree that "the judgment is discharged and annulled as an act of the court by the decree in bankruptcy, and its vitality gone," and that "none but

the court can give it new life," and that "this cannot be done by matter in pais," as in *Ott v. Perry*, 1 Phila. 77. In this way the promise becomes a part of the record, and the judgment a good foundation for the sale and title, and record evidence of it in ejectment. The evidence of the new promise to affect the judgment barred by the discharge in bankruptcy was insufficient and improper. The title of the defendant, based upon the judgment, was therefore insufficient and of no effect as against the plaintiff's original title. This would seem to render the proceedings by execution and sale void and of no effect. Whether they may become valid by any future proceedings to enforce the promise, *quære*. The court should have found the plaintiff's title good, and rendered judgment accordingly.

The judgment of the circuit court is reversed, and the cause remanded, with direction to render judgment in favor of the plaintiff.

BANKRUPTCY. — AS TO A NEW PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY, see note to *Barnes v. Parks*, 27 Am. Dec. 367-369. Compare *Tucker v. Hurst*, 70 Mich. 153; 14 Am. St. Rep. 433, and note.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

HESPERIA LAND AND WATER COMPANY v. ROGERS.

[83 CALIFORNIA, 10.]

EASEMENT — ADVERSE USER, ABANDONMENT OF. — The continuity of an adverse user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. Thus such a right to the use of a ditch to convey water for irrigation purposes is not abandoned because water does not flow in it every day in the year. If the claimant has used the ditch at such times as he needed it, it is regarded by the law as a continuous use.

EASEMENT IN IRRIGATION DITCH BY ADVERSE USER — CONTINUITY OF USER — PRESCRIPTION. — A claimant of an easement in an irrigation ditch, constructed by him over the land of another, may show his prescriptive right therein, by proving the use of the water running in the ditch, for irrigation purposes, every year during the cropping season, and when he needed it, for more than five years.

EASEMENT BY ADVERSE USER — TAX ASSESSMENT AS EVIDENCE. — In an action to establish a prescriptive right to the use of an irrigation ditch over the land of another by adverse user, if it does not appear that the claimant's easement in the ditch has ever been assessed for taxes, an assessment-book showing an assessment of the land over which the ditch runs is inadmissible as against the claimant.

R. M. Widney and H. C. Rolfe, for the appellant.

Elmer E. Rowell, for the respondent.

THORNTON, J. Action to quiet title to a parcel of land situated in the county of San Bernardino. Defendant had judgment. Plaintiff moved for a new trial. His motion was denied, and he appeals from the judgment, and order denying his motion.

The controversy turned on the adverse user of defendant,

for more than five years, of an irrigating ditch, constructed by him over plaintiff's land.

The adverse user is made out by defendant, unless the contention of plaintiff that it was not continuous is maintainable.

And it is urged that the user by defendant was not continuous, for the reason that defendant only ran the water in the ditch every year during the cropping season and when he needed it.

The correct rule as to continuity of user, to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. The right is not abandoned to the use of a ditch to convey water for purposes of irrigation because water does not flow in it every day in the year. The party claimant does not need the ditch every day in the year, and the law does not require him, to constitute continuity of use, to use the water when he does not need it. If he has used the ditch at such times as he needed it, it is regarded by the law as a continuous use. If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require. So it is of the ditch. If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use. An omission to use when not needed does not disprove a continuity of use, shown by using it when needed: *Bodfish v. Bodfish*, 105 Mass. 317. Neither such intermission nor omission breaks the continuity.

It does not appear that the defendant's easement in the use of the ditch has ever been assessed for taxes, and the court did not err in excluding the assessment-book, showing an assessment of plaintiff's land for taxes, over which the ditch ran.

There is no error.

Judgment and order affirmed.

EASEMENT — ADVERSE USER. — Right to run a ditch through another's land can be created by user only when such user has been actual, adverse, peaceable, uninterrupted, and continued for the statutory period: *Johnson v. Jordan*, 2 Met. 234; 37 Am. Dec. 85, and note; see also *Earl v. De Hart*, 12

N. J. Eq. 280; 72 Am. Dec. 395; *Delahoussaye v. Judge*, 13 La. Ann. 587; 71 Am. Dec. 521, and note; *Totsl v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, and note.

EASEMENTS, EXTINGUISHMENT OF, BY NON-USER: See note to *Orr v. O'Brien*, 14 Am. St. Rep. 278-282.

[IN BANK.]

PEOPLE v. HAYNE.

[33 CALIFORNIA, 111.]

CONSTITUTIONAL LAW — SUPREME COURT COMMISSIONERS. — A statute granting to the supreme court the power to appoint commissioners thereof whose duty it shall be, under such rules and regulations as the court may adopt, to assist it in the performance of its duties and in disposing of undetermined cases before it, is not unconstitutional, nor open to the objection that under it such commissioners are vested with judicial power.

CONSTITUTIONAL LAW. — PRESUMPTION IN FAVOR OF CONSTITUTIONALITY OF STATUTE is always indulged, and if the language employed is capable of two or more constructions, any one of which is in harmony with the constitution, it is the duty of the court to give it that construction. One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but must also show that by the natural and necessary import of the language used it is in conflict with the supreme law.

SUPREME COURT COMMISSIONERS NOT VESTED WITH JUDICIAL POWER. — The power vested in a supreme court commission appointed by the court to examine causes submitted to the court, and to report facts or conclusions in the form of opinions to it for its judgment, is not judicial, within the meaning of the constitution; and when the court retains the inherent power not only to decide but to make all binding orders or judgments in such cases, this constitutes the only exercise of judicial power.

CONSTITUTIONAL LAW — SUPREME COURT COMMISSIONERS — INFLUENCE ON COURT. — An objection against a supreme court commission appointed by the court, that there ports and opinion of the commission in cases submitted to it are likely to or may have an undue influence on the court in its subsequent consideration of such cases; and in the rendition of judgments thereon, does not go to the constitutionality of the law under which the commission is appointed, nor tend to show that the commissioners are usurping judicial power.

George A. Johnson, attorney-general, for the appellant.

S. M. Wilson and John Garber, for the respondents.

FOX, J. This case comes to us on appeal from the superior court of the city and county of San Francisco. It is one of such commanding public importance, involving, as it does, the course of procedure in and validity of many of the judgments rendered by this court, that upon motion it has been advanced

on the calendar, and is given precedence in the order of determination.

It is a proceeding against the defendants, R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson, and P. Vanclief, the commissioners of this court, to inquire "by what authority they claim to exercise any judicial powers within the state of California, and particularly of considering and determining cases on appeal to the supreme court of said state."

The complaint charges,—1. That the defendants are exercising the office of judges of the supreme court of the state of California, and as such claim the right to and do pass upon cases appealed from the superior courts of the state to the supreme court, and decide the same by virtue of their appointment as supreme court commissioners; 2. That the act of the legislature creating the commission, approved March 12, 1885, and the acts amendatory of and supplementary thereto, are contrary to the provisions of article 6, sections 1, 2, 3, and 4 of the constitution of the state of California, and are null and void; 3. That the only authority of the defendants to consider and pass upon appeals to the supreme court is by virtue of their appointment as commissioners, and the authority conferred under and by virtue of said acts; 4. That they and each of them are usurping the office of supreme judge of the state of California, and exercising the judicial powers of the state, vested solely in the supreme court by the constitution and laws of the state; and 5. That their only claim so to do is by virtue of their appointment under the acts of the legislature aforesaid.

The defendants answer, denying that they, or either of them, claim, or have ever claimed, or that they, or either of them, have ever exercised, or are now exercising, the office of judges of the supreme court; that they, or either of them, as such, or otherwise, claim the right to or do pass, or have ever passed, upon cases, or any case, appealed from the superior court to said supreme court, or to decide, or have decided, the same, by virtue of their appointment as supreme court commissioners, or otherwise; deny that they, or either of them, claim, or have ever claimed, the right or authority to hear or determine causes, or any cause, on appeal from the superior court to the supreme court; deny that they, or either of them, do claim, or have ever claimed, the right to exercise any judicial power within the state; and deny that they, or either of them, are, or ever have been, usurping the office of supreme judge of the

state of California, or exercising any judicial office or function whatever. They further aver that they are commissioners appointed under the act of the legislature approved February 15, 1889, to provide for the appointment by the supreme court of five commissioners, to be known as commissioners of the supreme court, etc., and that the only work which they, or either of them, perform, or claim the right to perform, or have ever performed, or claimed the right to perform, by virtue of their appointment, or otherwise, consists in the preliminary examination of the records and briefs in cases referred to them by the supreme court, or the justices thereof, and of the authorities cited in such briefs, and in the making to the court and the justices thereof of written suggestions and opinions of the defendants, or some of them, as to the proper disposition of said causes so referred as aforesaid, for the consideration of the said court and justices in the determination and disposition of said causes by said court and the justices thereof; that said suggestions and opinions have no force or effect whatever as judgments or decisions, nor are they filed or recorded as such; that neither of the defendants, or any of them, ever enter or direct any judgment or decision whatever in any case whatever, or ever have entered, or caused to be entered, any judgment, order, or decision whatever, in any case whatever, or ever claimed the right so to do; that neither they, or any of them, do perform or exercise, or ever have performed or exercised, any other function than as above stated. They further deny that they, or either of them, hold, or claim to hold, their positions as such commissioners under the said act of March 12, 1885, or any act amendatory thereof or supplementary thereto.

On the issues thus framed, trial was had, resulting in a judgment in favor of the defendants, and dismissing the action. Motion for a new trial was made, and heard upon a statement of the case, and denied, when plaintiff appealed from the judgment, and from the order denying the motion for new trial.

Upon the record, and as the case is presented in this court, there are but two questions for consideration: 1. Is the act under which it is conceded that these defendants were appointed — the act entitled "An act to provide for the appointment by the supreme court of five commissioners, to be known as commissioners of the supreme court, and to appoint a secretary therefor, to relieve said court from the overburdened

condition of its calendar, and to provide for the compensation of said commissioners and secretary, and to appropriate money therefor," approved February 15, 1889 (Stats. 1889, p. 13) — in conflict with the constitution? 2. Are the defendants usurping powers not conferred by the act?

1. The first section of the act is the only one which needs to be considered in the discussion of either of these questions. It reads as follows: —

"Sec. 1. The supreme court of the state of California shall immediately upon the expiration of the term of office of the present supreme court commissioners appoint five persons of legal learning and personal worth as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the constitution of the United States, and the constitution of the state of California, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner."

This section contains all that there is in the entire act on the subject of the powers or duties of the commissioners. Every presumption is, as is the case with all legislative enactments, in favor of the constitutionality of the provision. It was enacted by a senate and assembly, every member of which was sworn to support the constitution, and is presumed to have passed his judgment to the effect that it is not in conflict with that instrument. It was approved by the chief executive, who was under like obligation, and whose judgment is usually exercised with even more deliberation than can be had in the hurry and confusion often attending upon the action of legislative bodies. The judgment of these two great departments of the government is not to be lightly disregarded or turned

aside. Yet it is the province of the judicial department to finally determine the question of the constitutionality of this or any other statute law whenever a litigant shall challenge the judgment of the other departments, and appeal to this for that final determination. It is also the duty of the judicial department, of its own motion, to pass upon and determine this question for itself whenever it is called upon to act in the exercise of its own jurisdiction under a statute like the one under consideration. This court was so called upon to act when, on the thirteenth day of May, 1889, it appointed these commissioners, under and in conformity with the provisions of said act of February 15, 1889. By the very act of appointment, it, by necessary implication if not by direct ruling, held the act to be a valid law under the constitution. And this holding was not without direct precedent, even in this state, and under the present constitution. Under a similar act, approved March 12, 1885, this court as then constituted appointed a commission for a like purpose and with like powers, consisting of three members, and by such appointment recognized the act as a valid law under the constitution. From that time until the creation of the present board, under the act of 1889, the commissioners so appointed exercised all the functions that are authorized to be exercised or are in fact exercised by these defendants under the said act of 1889. That commission and the present one have, unchallenged, assisted the court in the examination and preparation for decision of over a thousand cases, wherein the judgments were *coram non judice*, if it be true, as claimed by the relator, that the act authorizes the commissioners to exercise functions, and they have exercised functions, judicial in their character, and which by the constitution are conferred alone upon the justices of this court. To reverse a construction which must of necessity have been given to these statutes before or at the time of the appointment of these commissioners, and which has been acquiesced in for so long a time, and thereby produce such a result as would follow such reversal, is a thing which ought not to be done by any court, unless there is found the gravest necessity for doing it. If the question of the constitutionality of the act was even doubtful, after such a lapse of time and such a practice under the act, the doubt ought to be resolved in favor of its validity, and the case be left to rest on the doctrine of *stare decisis*.

But to our minds there is no doubt about the validity of

the statute. In the language of the court below: "The act in question is not open to objection of a constitutional character. In order to bring it into conflict with the constitution, a strained construction of its words becomes necessary, as well as an utter disregard of the natural import of those words. . . . The phrase 'assist the court' must, for the purpose of creating a conflict, be understood not merely to facilitate the court, — which is the natural import, — to lessen its labors, but beyond this, to assume the exercise of, or a participation in the exercise of, the appropriate function of the court to decide causes; that the commissioners are to take part in that decision as the members of the court themselves take part in it; in short, it is necessary to say that 'assistance' means 'supersession.'"

Nothing in the language used, or in its context, will justify any construction which will bring the provisions of this act in relation to the powers or duties of the commissioners in conflict with any provision of the constitution. If the language employed was capable of two or more constructions, any one of which would be in harmony with the constitution, it would be our duty to give it that construction. But, fortunately, we are not driven to the selection of one of several possible constructions. There is but one "warranted by the natural import of the language employed." One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but he must show that by the natural and necessary import of the language it is clearly in conflict with the supreme law. That has not been, and cannot be, done in this case. Not only is there an entire failure to confer judicial power upon these commissioners, but there is also an entire absence of an attempt to interfere with the exercise of the power conferred by the constitution upon and belonging to the judicial department of the government. The legislature has provided for the appointment and compensation of these commissioners; they are given no power except to "assist the court," under such rules and regulations as it may adopt, in the performance of its duties. The great burden of the work of this court is that which is necessarily done in sifting the causes to ascertain from the mass of matter brought here in each case the truth and the law bearing upon it, preparatory to the processes of adjudication and judgment. To say that the court cannot be assisted in this preliminary work by men sworn to fidelity, learned in the law, unconnected

with and unbiased in the causes, is to deny us unbiased assistance in the very direction in which we are bound to receive it, and do receive it, in every cause that comes before us, from counsel not equally free or likely to give us unprejudiced opinions and statements and to deny us such assistance as courts of every grade have been accustomed, time out of mind, to receive, without objection, in this country and in England. It is no more unconstitutional for this court to receive such assistance from commissioners designated by itself, or from *amici curiæ*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause. As well might it be said that section 266 of the Code of Civil Procedure, which provides that the secretaries and bailiffs of this court shall hold their offices at the pleasure of the justices and "shall perform such duties as may be required of them by the court or the justices thereof," is unconstitutional, and conferred upon those officers judicial power.

"The power to hear [examine] causes and report facts or conclusions to the court for its judgment is not judicial, within the meaning of the constitution": *Shoults v. McPheeters*, 79 Ind. 378. "No action which is merely preparatory to an order or judgment to be rendered by some different body can properly be termed judicial. . . . It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on the persons or things only through its action and by virtue of it": *Underwood v. McDuffee*, 15 Mich. 361; 93 Am. Dec. 194.

The only case cited by the relator in support of his argument against the constitutionality of this act is that of *State v. Noble*, 118 Ind. 350; 10 Am. St. Rep. 143. While this case, or that of any other state court of last resort, is not binding as authority upon this court, it would be strongly persuasive if the act of the legislature under consideration was not so unlike our own as entirely to defeat the purpose for which it is cited here. There, as here, the legislature provided for the appointment of a commission to assist the supreme court in the performance of its duties. But there it provided that the legislature should appoint the commissioners, and in case of vacancy in the commission the same should be filled by appointment made by the governor, thus taking away from the judicial department the power to select its own assistants,

and thrusting upon the court men selected by the political and executive departments of the government. Chief Justice Elliott, who wrote the opinion, is widely and favorably known, not only for his legal learning and ability, but for the tenacity with which he insists upon the independence of the several departments of the government, and resents any encroachment upon the powers and rights of the judiciary. The only question upon which he was called upon necessarily to decide in the case was as to the right of the legislature to appoint, or to provide for the appointment by any other officer than the court itself, of commissioners who should act as assistants to the court in the performance of its duties. This question he discusses ably, and finally declares: "It cannot be doubted that judicial power includes the authority to select persons whose services may be required in judicial proceedings, or who may be required to act as the assistants of the judges in the performance of their judicial functions, whether they be referees, receivers, attorneys, masters, or commissioners. . . . As the judicial power embraced the authority to select 'ministers and assistants' at the time the constitution was adopted, that right was sanctioned and confirmed; for it was the power then existing that was so carefully and fully vested in the courts. It was, as we have shown, a well-known and fully recognized principle that courts should, as part of the judicial power, have the right to choose their own assistants, and the constitution has secured and confirmed that principle beyond the power of the legislature to shake it."

The court then discusses other features in the act, not found in our own, conferring upon the commissioners certain powers not conferred by our act, and which in their nature constitute a part of the judicial power of the court; and in view of these several features holds the act to be unconstitutional. But as we read it, there is nothing in the decision to indicate that the act here under consideration would have been held by that court to be in conflict with the constitution, or that the legislature might not provide for the court itself appointing commissioners to assist it or its justices in the preliminary and preparatory work necessary to the final adjudication and determination of the causes before it.

2. In the investigation of the second question involved, one of the justices of this court longest in commission, — one who has been upon this bench ever since the organization of the court under the present constitution, — and one of the com-

missioners longest in service, were called and examined as witnesses, and it was agreed that the other justices and commissioners would testify substantially the same way.

From the testimony thus elicited it was distinctly and clearly shown that the answer of the defendants was and is true,—that they do not usurp the functions of judges of this court, and do not exercise any judicial power whatever. They receive, not from the clerk,—for they have no communication with him,—but from the secretaries of the court, such of the transcripts and briefs as the court shall have assigned to them, and make a critical examination of the transcripts, briefs, and of the authorities cited by counsel, and report to the court the result of such examination, with their opinion thereon, accompanied with a citation of the authorities, and also with frequent references to folios of the transcript, to aid the court in its investigations.

These reports and opinions have no force or effect whatever as judgments of the court,—do not go to the clerk, but through the secretaries come back to the judges, and they never reach the office of the clerk of the court, or become in any manner public, unless, upon examination by the justices themselves of the record, the briefs, and the opinions so furnished by the commissioners, they are approved and adopted by a constitutional number of the justices, and the judgment of the court is ordered in conformity therewith. Many of these reports and opinions are never approved, and never see the light. Others of them are used in part, and only in part. In every case, when the judgment is rendered, it is the judgment of the court, and not of the commissioners. Nothing originates before these commissioners, and nothing terminates with their labors or their opinion. The conclusions to which they arrive are but opinions submitted for our adoption, if we think they are founded in reason and law. Hence their reports and opinions are neither decisions nor infallible guides, but they are serviceable instrumentalities to aid us in performing our functions. The commissioners exercise no power *proprio vigore*. The court acquires the jurisdiction, and the court renders the judgment upon the controversy; therefore the whole exercise of the judicial power is by the court, the commissioners acting only in an intermediate capacity, as auxiliary to the court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decision and judgment.

Another objection urged against this commission is, that the

guage, but to put upon record the grounds of their decisions for the guidance of the public in their business transactions.

The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it, makes it its own.

"But," it is asked, "if the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission? It saves the court no labor, and does nothing to facilitate the disposition of causes."

This is a wholly mistaken assumption. The examination of the record of a case and the argument of counsel, for the purpose of ascertaining the material facts and the law bearing upon them, is a very large part of the labor of decision, but it is by no means all. There are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task; but I apprehend that, according to the experience of most judges, the putting of their opinions in form, even after their minds are fully made up, is a very serious labor, requiring the expenditure of a large portion of the time at their disposal.

By the labors of the commission, this time and much serious labor is saved to the court in a large proportion of the cases referred to them, without any abdication or delegation by the court of its constitutional functions.

CONSTITUTIONALITY OF STATUTES, GENERALLY. — Statutes will not be declared unconstitutional, if by any legitimate rule of construction they can be declared valid: *Meyer v. Berlandi*, 39 Minn. 433; 12 Am. St. Rep. 663; *People v. Terry*, 106 N. Y. 1.

PEOPLE v. MULLINGS.

[33 CALIFORNIA, 122.]

CRIMINAL LAW — MURDER — CROSS-EXAMINATION OF ACCUSED. — Where a defendant charged with murder becomes a witness in his own behalf, and denies the killing, a wide range of cross-examination may be allowed, because of the general nature of defendant's statement.

CRIMINAL LAW — EVIDENCE — PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE. — When a defendant in a criminal case has offered himself as a witness in his own behalf, but has not testified in chief to any communications between his wife and himself, he cannot, without his consent, be cross-examined as to any such communications, although, since the time they are claimed to have been made, the husband and wife have been divorced.

PRACTICE — OBJECTIONS TO CLASS OF INCOMPETENT TESTIMONY NEED NOT BE REPEATED. — Where objection has been clearly and pointedly made and overruled several times to a certain line or class of testimony as privileged communications between husband and wife, and therefore inadmissible, the objection need not be repeated to every question of the kind asked, especially when a motion to strike out all such evidence is made and overruled at the close of the examination of the witness.

CRIMINAL LAW — NEW TRIAL — PREJUDICIAL ERROR IN ALLOWING INCOMPETENT QUESTIONS TO BE PUT. — Conviction must be set aside, and a new trial granted, where in a murder case incompetent questions are asked defendant, which assume the existence of damaging facts, and are put with such persistency and show of proof as to make it evident that the questions, and not the answers, were what was considered important, and thus impress upon the minds of the jury the probability of the existence of the assumed facts upon which the questions were based, although the prisoner denies their existence, and there is no other proof.

W. J. Herrin and M. C. Barney, for the appellant.

George A. Johnson, attorney-general, for the respondent.

McFARLAND, J. Defendant was charged with the murder of one John S. Moore. He was convicted, and sentenced to the state prison. He appeals from the judgment, and from an order denying him a new trial.

Defendant went upon the stand as a witness in his own behalf. After a denial that he had made one or two statements testified to by one or two of the witnesses for the prosecution, his testimony consisted simply of the following question and answer: "Q. Did you, or did you not, kill John Moore? A. No." Upon cross-examination the prosecution asked him a great variety of questions, against the objections of his attorney that they were not proper cross-examination of a defendant under section 1323 of the Penal Code; that is,

that they were not as to "matters about which he was examined in chief." The cross-examination in this respect certainly went, at least, to the very verge of error,—a place where prosecuting officers seem frequently to want to go on all doubtful questions. But, considering the general nature of defendant's statement, this court (at least a majority of it) is not prepared to say that error was committed on the sole ground that the questions asked were not proper cross-examination. In the course of the cross-examination, however, the prosecution asked the defendant a long list of questions about conversations between him and his wife, to which his counsel objected, on the additional ground that they were privileged communications, about which he could not be examined. The objection was overruled, and defendant excepted. This was error of a most material character. (At the time of the conversations asked about, the person with whom they were had was defendant's wife, although afterward she was divorced from him.)

The provisions of our codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: The privilege at common law did not extend to communications which were not in their nature confidential; and although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our code sweeps away that embarrassing distinction by extending the privilege to "any communication made by one to the other during the marriage": Code Civ. Proc., sec. 1881.

The general rule is stated in section 398 of Wharton's Criminal Evidence, as follows: "Aside from the question of interest, confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in the confidential intercourse during the marital relations." The main provision of our codes upon the subject is as follows: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the mar-

riage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage." The rule is founded on public policy, and its purpose, as stated in the clause of the code just quoted, is to "encourage confidence, and preserve it inviolate"; and no disclosure can be forced from either spouse without the consent of the one against whom it is sought to be used.

In *Murphy v. Commonwealth*, 23 Gratt. 960, the rule was applied to a mere witness for the prosecution. In that case, Alexander Murphy was on trial for an alleged assault, with intent to kill, on one John Murphy. John Murphy was a witness for the prosecution, and on cross-examination he was asked by counsel for defendant if he had not stated to his wife that defendant acted only in his own defense. The prosecution objected to the question as privileged, and the objection was sustained, and the supreme court of appeals of Virginia held the ruling correct, because the question "required him to state a communication supposed to have been made by him to his wife, which, if made, was what the law considers a confidential communication, and which he was not bound to disclose." And of course the rule applies much more strongly to a defendant himself on trial upon a serious charge.

It has been repeatedly held that a party offering himself as a witness in his own behalf cannot be cross-examined as to any communication made to his attorney. In *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362, the defendant was indicted for and convicted of forgery. He was a witness for himself, and, on cross-examination, the state succeeded in examining him, over his objection of privilege, about certain communications made by him to his attorney concerning the matter in controversy. But the supreme court of Ohio reversed the judgment for this error, and in its opinion said, among other things, as follows: "The privilege applies to the communication; and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or his legal adviser." And the court further says: "Nor do we see the propriety of not allowing the attorney to make the disclosures without the consent of his client, and yet compelling the client himself to make them."

In *Bigler v. Reyher*, 43 Ind. 112, it was held (we quote for brevity from the *syllabus*) that "communications made in consultation by a client to his attorney are privileged, and pro-

tected from inquiry, when the client is a witness, as well as when the attorney is a witness."

In *Hemenway v. Smith*, 28 Vt. 701, one Orcutt, who was a defendant, was a witness on his own behalf, and was cross-examined, against his objection, about consultations with his attorney. For this error the judgment was reversed, the supreme court of Vermont saying that "the rule should be the same as it would have been if the counsel had been called to prove the consultation."

In *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 406, it is held that a witness is protected from testifying as to any communication he may have made to his attorney in confidence.

In *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, the defendant, who was being tried for bigamy, was a witness for himself; and he was cross-examined by the prosecution, against his objection, about consultations with his attorney. For this error the judgment was reversed; and the court, after reciting that the statute prevents an attorney from testifying about communications made to him by his client, proceeds as follows: "This statute would be of no utility or benefit if the client could be compelled, against his consent, to make such disclosures. It would be absurd to protect, by legislative enactment, professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise."

The reasoning and philosophy of these cases (and there are many others to the same effect) apply with increased force to the relation of husband and wife, — a relation more confidential than that of attorney and client, — indeed, the most confidential relation known to human beings. And we have cited the above cases because they are closely analogous in principle to the one at bar, and because we have been unable to find any reported case where it has been attempted to compel a defendant in a criminal case to testify to communications between his wife and himself. Slightly changing the language above quoted from *State v. White*, 19 Kan. 445, 27 Am. Rep. 137, but applying its principle to this case, we can say that "this statute would be of no utility or benefit if the husband could be compelled, against his consent, to make such disclosures. It would be absurd to protect communica-

tions between husband and wife, and to leave them unprotected on the examination of the husband." All along the line of the cases about communications between client and attorney, it was steadily argued on the one side that the statute only prevented the attorney from testifying, and that when the client was on the witness-stand he could be forced to disclose; and the constant answer of the other side — sustained by the courts — was, "the privilege applies to the communication," and it cannot be forced from either party to the confidential relation. It is clear to us, therefore, that a defendant in a criminal case who has offered himself as a witness in his own behalf, and who has not testified in chief to any communications between his wife and himself, cannot, without his consent, be examined by the state as to any such communications.

The attorney-general makes the point that the defendant's attorney did not sufficiently object, on the ground of privilege, to the questions asked defendant about communications with his wife; but the point is not tenable. We do not understand that when an attorney has clearly and pointedly objected several times to a certain line or class of testimony he is called upon to repeat his objection to every question. Such repetition would be unbecoming, and needlessly annoying to the court. The first question in the case at bar to which the question applied was this: "What did you say to your wife when you went home that night?" The objection of defendant's counsel was this: "We object to any conversation between him and his wife, as not in cross-examination, and as improper, being a privileged communication." The court overruled the objection, and defendant excepted. Further on, to the question, "Did you not tell your wife that you had killed a man?" the objection was: "We object, on the ground that, even if so, it was a privileged communication." Objection overruled, and defendant excepted. Other objections were made to similar questions which did not expressly state the ground of "privilege," but which did state, among other things, that the question was "not in cross-examination, and incompetent." The word "incompetent," under the circumstances, was sufficiently broad to include the ground of objection under review. Such questions were "incompetent"; that is, apart from the consideration of relevancy and materiality, they were incompetent, because prohibited by law. Again, toward the close of the cross-examination, when a

question was asked about something which the wife was assumed to have said to the defendant, his attorney said: "All this testimony, pretended conversations between this man and his wife, I move to have stricken out, for the reason that they are not such communications as can be repeated in any form, because the wife would not be allowed to come in and testify to them, and because irrelevant and incompetent for any purpose whatever. They are not such conversations as can be rebutted in any way, but are, if anything, privileged communications, not allowed to be brought out in court. I shall ask for a ruling on the motion as soon as the testimony of the witness is finished." And at the close of the examination of defendant, his attorney said as follows: "Now, we move to strike out all the evidence with reference to conversations had between this defendant and his wife concerning the killing of John Moore, as not such evidence as can be brought out by the prosecution, because privileged." The motion was overruled, the court announcing the broad proposition that "any declaration that he might have made to his wife he might be interrogated about on cross-examination." The defendant excepted. It appears, therefore, that defendant's objection to the evidence was clear, fair, and full, that it was thoroughly understood by the court, and that it was pointedly overruled.

Counsel for respondent contends that the questions asking defendant about conversations with his wife did not injure him, because his answers to them were mostly in the negative. But what answers were expected? After defendant testified that he did not kill John Moore, can any sane man think that the district attorney supposed for a moment that defendant would answer affirmatively a long list of questions framed upon the presumption that he did kill him? Why, then, did he ask them? And if the questions and answers did not help to strengthen the case against defendant, why did not the prosecution consent to have them stricken out? It is quite evident that the questions, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense. The questions themselves were incompetent;

and after one or two of them had been asked showing the purpose of the prosecution, counsel should not have been allowed to ask others of like character. A similar point to the one under discussion — that is, that the defendant was not injured by the questions on account of the character of the answers — was made in *Gale v. People*, 26 Mich. 161; but in that case Judge Cooley, delivering the opinion of the court, says: "A review of the evidence in this case suggests very forcibly that, however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it, and there is no other evidence. Holding that these questions were erroneous, and that they might, and probably did, prejudice the prisoner, the conviction must be set aside and a new trial ordered." Of course, occasionally one or two questions may be erroneously allowed, and the answers may be such that under the circumstances of the case it can be readily seen that no injury was done. For instance, counsel for respondents cites *People v. Brown*, 76 Cal. 574. In that case the court was dealing with one single question of doubtful propriety, and held that at all events the defendant could not have been injured by it, because, as the court said, "He would not have been in any more favorable position if the question had neither been asked nor answered." The distinction between that case and the one at bar is too apparent to need pointing out.

We see no other matters in the record necessary to be noticed in detail. The examination of defendant's divorced wife was properly stopped as soon as she was asked about communications between defendant and herself during the marriage. The instruction as to preponderance of evidence is mostly of a negative character, and can hardly be said to be erroneous; but it would be safer for prosecuting attorneys and courts to limit themselves on that subject to the language of the code. Great exuberance in the way of instructions is a prolific source of difficulty. Of course, when a defendant asks for doubtful instructions the court is compelled to pass on them; but district attorneys and courts should not themselves voluntarily load up records with a mass of instructions which are both doubtful and unnecessary.

Judgment and order reversed, and cause remanded for a new trial.

AN ACCUSED AS A WITNESS IN HIS OWN BEHALF. — An accused need not testify against himself, nor can he be required to admit or deny, in the presence of the jury, anything bearing materially upon his guilt: *State v. Muckley*, 74 Iowa, 695. His failure to testify for himself will not raise any presumption against him; but having elected to testify in his own behalf, if he fails to rebut any criminating fact, when he can reasonably do so, this is a circumstance in the nature of an implied admission, which may be referred to in counsel's argument: *Otton v. State*, 87 Ala. 103; *Clark v. State*, 87 Ala. 71. If an accused voluntarily becomes a witness in his own behalf, he thereby waives his privilege as to criminating himself, and may be cross-examined as to every matter relevant to the issue: *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346, and note 348, 349; *Raines v. State*, 88 Ala. 92; *People v. Sutton*, 73 Cal. 243; *Keyes v. State*, 122 Ind. 527; *Peck v. State*, 86 Tenn. 259. While the testimony of a defendant in his own behalf, when accused of a crime, may be wholly disbelieved by the jury, when not satisfactory to their minds: *Lewis v. State*, 88 Ala. 11; still he is not in the attitude of an accomplice, and need not be corroborated, to be believed: *State v. Patterson*, 98 Mo. 283.

Proof of a conviction of an offense not infamous will not impeach the credibility of an accused who testifies in his own behalf: *State v. Taylor*, 98 Mo. 240. And, in Tennessee, an accused may testify in his own behalf, even though he is under sentence of infamy: *Morgan v. State*, 86 Tenn. 472.

The court cannot require an accused, who is also a witness, to leave the court-room while other witnesses are giving their testimony. Being a witness in his own behalf does not affect the right of the accused to be present during his own trial, whether charged with a felony or misdemeanor: *Garman v. State*, 66 Miss. 196. And the court cannot, as a condition of permitting an accused to testify, require him to be examined before the other witnesses are examined: *Bell v. State*, 66 Miss. 192.

BURGESS v. FAIRBANKS.

[88 CALIFORNIA, 215.]

VENDOR'S LIEN — SUFFICIENCY OF COMPLAINT. — A complaint averring that plaintiff sold land to a defendant for a certain sum, a particular portion of which remains due and unpaid, and that at the time of the sale, for reasons known to such defendant, and at his request, the conveyance of the land was made by plaintiff, with the name of another defendant inserted therein, and that the latter knew all the facts of the transaction, is sufficient to warrant the enforcement of the vendor's lien as against the latter defendant.

VENDOR'S LIEN — REMEDIES AT LAW NEED NOT BE FIRST EXHAUSTED before a bill in equity to enforce a vendor's lien can be resorted to.

PROMISSORY NOTE — WHAT IS NOT. — An instrument acknowledging a certain sum to be due and payable when a suit in litigation is settled is not a promissory note.

VENDOR'S LIEN — WHAT DOES NOT CONSTITUTE WAIVER OF — EVIDENCE OF AGENCY. — A vendor does not waive his lien for unpaid purchase-money by taking as security a due-bill executed by a third person as agent for the purchaser; and in such case parol evidence is admissible to show how

such bill was received, and who was intended to be bound by it; and after the court has found that it was executed by the purchaser, the finding will be presumed to be supported by the evidence.

Barclay Henley, for the appellants.

John W. Turner, for the respondent.

McFARLAND, J. This is an action to enforce a vendor's lien for balance of unpaid purchase-money. Judgment was for plaintiff, and defendants appeal from the judgment on the judgment roll alone.

The complaint is sufficient. It avers clearly enough that plaintiff sold the land to the defendant George E. White for \$4,150; that of said purchase-money said White paid plaintiff \$2,400, and also, according to the terms of the sale, paid to one McMurray \$1,025, due on a mortgage on the land, and that the balance, \$750, with interest, is due and unpaid; that at the time of the sale, for reasons known to the said White, and at his request, a conveyance of the land was made by plaintiff, with the name of the defendant H. T. Fairbanks inserted therein; and that the latter knew all the facts of the transaction. These averments warrant the enforcement of the lien as against Fairbanks.

There is nothing in the point that the remedies at law must first be exhausted before a bill in equity to enforce a vendor's lien can be resorted to: *Sparks v. Hess*, 15 Cal. 186.

The point that plaintiff waived his lien by taking as security the promissory note of a third person is not tenable. The written instrument relied on to sustain this point is as follows:—
“\$725.

KIKAWAKA, Nov. 15, 1886.

“Due to George W. Burgess, and payable when the suit now in court between him and C. B. Rice is settled, seven hundred and twenty-five dollars.

[Signed]

“WM. T. WHITE,

“Agent for George E. White.”

This instrument is not a promissory note; and it is unnecessary to determine whether, *prima facie*, it is the personal obligation of the principal or the agent. It at least bears a strong suggestion of agency; and it would have been competent to show by parol evidence how it was received, and who was intended to be bound by it: *Bean v. Pioneer M. Co.*, 66 Cal. 451; 56 Am. Rep. 106; *Sayre v. Nichols*, 7 Cal. 534; 68 Am. Dec. 280. And as it is averred in the complaint and found by the court that the instrument was made by George

FIRE INSURANCE—GENERAL AGENT, WHO IS, HAVING POWER TO WAIVE CASH PAYMENT OF PREMIUM. — An insurance agent who, under general instruction from the home office, has authority, within certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payments of premiums. His powers cannot be limited by instructions not communicated to the insured.

FIRE INSURANCE—COMPANY BOUND BY ACTS OF AGENT IN EXCESS OF HIS AUTHORITY. — Where, by the terms of an insurance policy, a particular insurance agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of any limitation of his power, though he may have exceeded his authority and violated his duty to his principal.

FIRE INSURANCE—COMPANY BOUND BY ACTS OF LOCAL AGENT IN EXCESS OF AUTHORITY. — A local insurance agent, having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds the company by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess thereof.

FIRE INSURANCE—CREDIT FOR PREMIUM—TENDER OF PREMIUM AFTER LOSS. — A tender of payment of the premium on a policy of insurance, though made after loss, but within the term for which credit has been given, is a sufficient compliance with a condition that payment is a condition precedent to recovery. The company cannot refuse such tender, and then successfully insist upon a nonsuit because the premium was not actually paid.

FIRE INSURANCE—WAIVER OF CONDITIONS PRECEDENT BY AGENT. — The insured is not bound to take notice of conditions in the policy, that the premium must be actually paid, nor that the waiver of condition must be indorsed in writing on the policy, when it is executed and delivered to him as a valid and completed contract by an agent having authority to countersign it, and who, before or at the time of the delivery of it, has given the insured a credit upon the premium by parol. If a loss occurs, in such case, before the credit expires, the company is bound, notwithstanding the agreement for credit was not indorsed upon the policy. The limitation upon the power of the agent to waive such condition applies only after the policy has been delivered as an executed contract.

FIRE INSURANCE—WAIVER OF CONDITIONS PRECEDENT BY AGENT—KNOWLEDGE OF AGENT IS KNOWLEDGE OF COMPANY. — Where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy of insurance is fully known to its agent, local or general, who is authorized to consummate the contract of insurance, the agent's knowledge is the knowledge of the company, and his act in executing the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by it of such condition precedent and of the general requirement that waivers of conditions expressed in the policy shall be in writing indorsed thereon.

FIRE INSURANCE—CONTRACTS LIMITING WAIVER OF CONDITIONS—POWER OF AGENTS TO WAIVE. — An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver, not forbidden by the

statute of frauds; and whether the agent had the power to make such contract or to waive the condition, notwithstanding the provision in the policy requiring a writing, is a question of fact.

FIRE INSURANCE — WAIVER OF CONDITIONS BY AGENT. — A local insurance agent clothed with general power to solicit and consummate contracts of insurance stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent, by indorsement in writing on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of the delivery of the policy was not indorsed upon it.

FIRE INSURANCE — WAIVER OF CONDITION AS TO ARBITRATION OF LOSS. — Where a fire insurance policy provides for arbitration of the amount of loss on failure of the parties to agree thereon, no arbitration is contemplated or required except in that event; and if, after loss, the requisite proofs of the amount are furnished the company, and it does not object to such amount of loss, or the proofs thereof, but denies its liability on the ground that the policy does not exist, and was canceled before loss, this is sufficient evidence that the company acquiesced in the amount of loss claimed, and thereby waived its right to have it determined by arbitration.

Louitt, Woods, and Levinsky, for the appellants.

J. C. Campbell and P. W. Bennett, for the respondent.

VANCLIFF, C. The action is upon a policy of insurance, and the appeal is from a judgment of nonsuit.

The grounds of defendant's motion for nonsuit, and upon which the motion was granted, are presented by a bill of exceptions, and the record discloses the following facts:—

The defendant is a foreign fire insurance corporation doing business as such in this state, having general agents for the state located in San Francisco, and a duly appointed local agent for the county of San Joaquin, located at Stockton. On May 2, 1887, plaintiffs verbally applied to the Stockton agent for a policy of insurance upon their frame barn, wind-mill, tank, and tank-house, situated about two miles southeast of Banta, in San Joaquin County. The land upon which these buildings stood was the property of G. W. Trahern,—the father of one of the plaintiffs,—who had permitted plaintiffs to erect the buildings thereon; but the buildings were the property of plaintiffs, who resided upon the land, and used and occupied the buildings. At the time the insurance was applied for, the local agent was informed that the land belonged to Trahern. The policy, as applied for, was issued insuring the buildings for the term of five years from May 1, 1887; the insurance on

the barn being for one thousand dollars, and upon the other structures for two hundred dollars. The policy does not refer to the ownership of the land on which the buildings stood.

On September 5, 1887, the barn was totally destroyed by fire; and it was admitted that when destroyed it was of the value of one thousand dollars. Notice and proof of the loss were duly given and made by plaintiffs, upon receipt of which the defendant, without questioning the amount of the loss, denied all liability on the policy. No offer or request was made by either party to submit the question as to amount of the loss to arbitration. At the time of the fire and loss no part of the premium had been actually paid; but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent and delivered to plaintiffs on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term of sixty days; and it was proved that the local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him. On June 25, 1887, the local agent mailed to plaintiffs at Banta a written notice stating that "the premium on policy No. 73,143, on barn, tank, etc., \$1,200, amounting to \$78.50, on five years' policy, falls due on the 1st of July, and our instructions from the home office are imperative to collect in sixty days," and inclosed in the same envelope was a notice that "unless the premium thereon shall be paid on or before twelve o'clock, noon, of July 1, 1887, we shall cancel the insurance under said policy on our books for non-payment of premium, without further notice, and terminate our liability thereunder from that date." It was proved that there was a regular daily communication by mail between Stockton and Banta, but neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled; but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full

amount of the premium, which he refused to receive. The pleadings admit that the amount of the premium was thereupon immediately deposited by plaintiffs subject to the order of defendant, and that defendant was notified in writing of such deposit, and payment of the amount to defendant is offered in the complaint.

The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies as to the use and occupancy of the premises. The following clauses are the only ones relevant to the points to be considered:—

“The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid.”

“The use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.”

“The insurance may be terminated at any time, at the option of the company, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy.”

“The amount of solid value and of damage to the property . . . may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall be submitted to competent and impartial arbitrators.”

“It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable by any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided.”

“In witness whereof, the Phoenix Insurance Company has caused these presents to be signed by its president and attested by its secretary, in the city of Brooklyn, county of Kings, New York; but the same shall not be binding until countersigned by Henry C. Keyes, agent for the company at Stockton.

“STEPHEN CROWELL, President.

“PHILANDER SHAW, Secretary.

“Countersigned at Stockton this twenty-fourth day of May, 1887.

HENRY C. KEYES, Agent.”

1. The defendant contends that there is no liability upon the policy, because the premium was not actually paid before

the loss, and because the agreement for credit was not indorsed in writing upon the policy.

It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and that in such case the company is liable for a loss which may occur during the period of the credit: *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; 90 Am. Dec. 787; *Wood v. Poughkeepsie M. Ins. Co.*, 32 N. Y. 619; *Goit v. National P. Ins. Co.*, 25 Barb. 190; *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 18 Barb. 69; *Sheldon v. Atlantic Fire & M. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 231; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Ohurch v. Lafayette Fire Ins. Co.*, 66 N. Y. 222; *Washoe Tool Mfg. Co. v. Hibernia Ins. Co.*, 66 N. Y. 613; *Latiox v. Germania Ins. Co.*, 27 La. Ann. 113; *Pino v. Merchants' Mutual Ins. Co.*, 19 La. Ann. 233; 92 Am. Dec. 529; *Miss. Val. Life Ins. Co. v. Neyland*, 9 Bush, 439; *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 506; *Eagan v. Aetna Fire Ins. Co.*, 10 W. Va. 583; *Hodge v. Security Ins. Co.*, 33 Hun, 584; *O'Brien v. Union Mut. Ins. Co.*, 22 Fed. Rep. 586; *Tennant v. Travelers Ins. Co.*, 31 Fed. Rep. 322; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 378; 24 Am. Rep. 784; *Ball and Sage Wagon Co. v. Aurora Ins. Co.*, 20 Fed. Rep. 232; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 440.

The reason for this rule is well expressed in the case last last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer or supposed by either party to make that condition a potent part of the contract. . . . It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or

that they did not suppose that he did so believe." In *American Central Ins. Co. v. McCrea*, 8 Lea, 520, 41 Am. Rep. 647, it is said: "It seems to be well settled that when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition of its breach will be considered as waived, because, otherwise, it would be an unmeaning form, the only effect of which would be to deceive and defraud."

In *Tennant v. Travelers Ins. Co.*, 31 Fed. Rep. 322, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium; and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company which extends the time for the payment of the premium upon an executed and delivered policy to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that period if no loss occurred meanwhile, and yet to deny the validity of the policy and its liability upon it during the period of credit in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least sixty days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent clothed with authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured": *Rivara v. Queen's Ins. Co.*, 62 Miss. 728.

In *Universal F. Ins. Co. v. Block*, 109 Pa. St. 538, it was held

that the countersignature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, require such countersigning to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy upon the ground that the premium was not actually received by the officers of the company.

The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consideration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid: Civ. Code, sec. 2598; *Basch v. Humboldt etc. Ins. Co.*, 35 N. J. L. 429; *Prov. Life Ins. Co. v. Fennell*, 49 Ill. 180; and upon principle the same result should follow where the policy is delivered as a valid and completed contract upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case, — from May 2 to October 1, 1887, — but was limited to a credit of sixty days; for it is sufficient that he had authority to give a credit of sixty days. The credit given was a valid credit for sixty days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the sixty days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company, it has no right to cancel the policy for non-payment of premium, except after

putting the insured in default: *Latioz v. Germania Ins. Co.*, 27 La. Ann. 118; and personal notice of intended cancellation must be given to the insured: *London etc. Ins. Co. v. Turnbull*, 86 Ky. 230.

If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective: *Mullen v. Dorchester Mutual F. Ins. Co.*, 121 Mass. 171. Notice of cancellation to the agent who negotiated the policy will not bind the assured: *Grace v. American Central Ins. Co.*, 109 U. S. 278; *Mutual Assurance Society v. Scottish U. & N. Ins. Co.*, 84 Va. 116; *London & L. F. Ins. Co. v. Turnbull*, 86 Ky. 230; nor to any other person than the one obligated to pay the premium: *Chadbourn v. German-American Ins. Co.*, 81 Fed. Rep. 533.

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance, and to countersign and deliver policies in San Joaquin County, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit: *Ball and Sage Wagon Co. v. Aurora F. & M. Ins. Co.*, 20 Fed. Rep. 232; *Post v. Aetna Ins. Co.*, 43 Barb. 351.

Whether an agent has general or only particular powers is not determined by simply calling him a local agent: *Murphy v. Southern L. Ins. Co.*, 3 Baxt. 448; 27 Am. Rep. 761. An agent who, under general instruction from the home office, has authority within a certain territory to deliver policies and receive premiums is a general agent, and has authority to waive cash payment: *Southern Life Ins. Co. v. Booker*, 9 Heisk 606; 24 Am. Dec. 844. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals: *Baubie v. Aetna Ins. Co.*, 2 Dill. 156. Where by the terms of a policy a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency who has no notice of limitation of his power, though he may have exceeded his authority and violated his duty to his principal: *Westchester F. Ins. Co. v. Earle*, 33 Mich. 151-153; *Viele v. Germania Ins. Co.*, 26 Iowa, 58; 96 Am. Dec. 88; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. 440; 27 Am. Rep. 761; *Whited v. Germania Ins. Co.*, 76 N. Y. 415; 32 Am. Rep. 380.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority: *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 234; *Miss. Valley L. Ins. Co. v. Neyland*, 9 Bush, 436; *Rivara v. Queen's Ins. Co.*, 62 Miss. 721; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Continental Ins. Co. v. Kasey*, 25 Gratt. 271; 18 Am. Rep. 681; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; *Nat. Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161; *Western Ins. Co. v. Hogue*, 41 Kan. 524. By the authorities above cited, it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given, must be assumed as a fact for the purposes of the motion for a nonsuit, it appearing, from the bill of exceptions, that evidence to that effect was given on behalf of the plaintiffs, without any counter-evidence whatever, unless the contents of the letter addressed to the plaintiffs by the defendant's agent at Stockton may be so construed. That letter only purports to notify them that "instructions from the home office are imperative to collect in sixty days," and that the premium "falls due on the 1st of July,"—two months after the policy was delivered,—thus clearly indicating that a credit of sixty days had been given with the sanction of the company; but as the letter was not received by the plaintiffs, it can have no effect as evidence against them for any purpose. It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of sixty days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of prepayment of the premium: *Elkins & Co. v. Susquehanna F. Ins. Co.*, 113 Pa. St. 386-394; *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591; 57 Am. Rep. 511; *Susquehanna F. Ins. Co. v. Elkins*, 124 Pa. St. 484; 10 Am. St. Rep. 608.

It is urged by respondent's counsel that actual payment of

the premium is a condition precedent to a recovery upon the policy, notwithstanding an agreement for credit, and that it was so decided in *Bergeon v. Builders' Ins. Co.*, 88 Cal. 546. But it appeared in that case that issue was taken on the fact of payment, and that there never was any actual payment or tender of the whole premium, and that the policy was canceled for non-payment of a part of the premium within the period of the credit given by the company, and after due notice. The case also holds that an acknowledgment of the receipt of the premium in a delivered policy may be contradicted so as to defeat a recovery upon the policy; but this rule has been changed by section 2598 of the Civil Code. The decision in that case is no authority against the position that a tender of payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy. The company cannot refuse such a tender, and then successfully insist upon a nonsuit because the premium was not actually paid: *Eagan v. Aetna F. & M. Ins. Co.*, 10 W. Va. 588; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 182; 90 Am. Rep. 787; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 119; 10 Am. Rep. 566; Civ. Code, sec. 1485.

2. The next important question relates to the effect of the provision in the policy that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such a provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk, or to occupancy of the insured premises: *Shuggart v. Lycoming F. Ins. Co.*, 55 Cal. 408; *Glad-ding v. C. F. M. I. A.*, 66 Cal. 6; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5. In the last case cited it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises, known to the insured, "does not interfere with that class of cases which have established that conditions for prepayment of premium and the like which enter into the validity of the contract of

insurance at its inception may be waived by agents, and are waived if so intended."

It has been expressly adjudged by the supreme court of Iowa, in a well-considered case, that the insured is not bound to take notice of conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract by an agent having authority to countersign it, and who, before or at the time of the delivery of it, has given the insured a credit upon the premium by parol; and that if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy: *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 378; 24 Am. Rep. 784.

And it has been repeatedly held that where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers of conditions expressed in the policy shall be in writing indorsed on the policy: *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 418-421; 32 Am. Rep. 330; *American Ins. Co. v. McCrea*, 8 Lea, 513-520; 41 Am. Rep. 647; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Westchester Fire Ins. Co. v. Earle*, 38 Mich. 151-153; *Viele v. Germania Ins. Co.*, 26 Iowa, 58; 96 Am. Dec. 83; *Murphy v. Southern Life Ins. Co.*, 3 Baxt. 440; 27 Am. Rep. 761; *Gerb v. Insurance Co.*, 1 Dill. 449; *Devins v. Home Ins. Co.*, 32 Wis. 471; *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. 402; *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Paine, 501; *N. E. Fire Ins. Co. v. Schettler*, 38 Ill. 166. It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden

by the statute of frauds: *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Garrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 141; 2 Am. Rep. 567; *Lamberton v. Conn. Fire Ins. Co.*, 39 Minn. 129; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153; *Reiner v. Dwelling House Ins. Co.*, 74 Wis. 89; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 326; 42 Am. Rep. 297.

Whether or not any particular agent has the general power of the company to make an oral contract or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact: *Insurance Co. v. Norton*, 96 U. S. 234; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 326; 42 Am. Rep. 297.

The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the home office, in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it: *Gerb v. Insurance Co.*, 1 Dill. 449; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 151-153; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 418; 32 Am. Rep. 330; *Viele v. Germania Ins. Co.*, 26 Iowa, 58; 96 Am. Dec. 83; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. 440; 27 Am. Rep. 761; *American Ins. Co. v. McCrea*, 8 Lea, 513-520; 41 Am. Rep. 647.

8. It is contended by counsel for respondent that the judgment of nonsuit should be sustained because the plaintiffs

did not demand nor obtain an award of arbitrators as to the amount of loss. This, it is said, was a condition precedent to a right to maintain this action.

No arbitration is contemplated or required by the terms of the policy, except in case of a failure of the parties to agree upon the amount of the loss. After the fire, and within the time prescribed by the policy, the plaintiffs furnished to defendant the requisite proofs of loss to the extent of one thousand dollars,—the amount alleged in the complaint,—and thereupon, without questioning or making any objection to the amount of the loss claimed, or to the proofs thereof, the company, for other reasons, not only denied its liability, but denied the existence of the policy, claiming that it had been canceled two months before the loss. This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed, and thereby waived its right to have it determined by arbitration: *Lasher v. Northwestern Nat. Ins. Co.*, 18 Hun, 98; 55 How. Pr. 318; *Western Horse and Cattle Ins. Co. v. Putnam*, 20 Neb. 381; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; 21 Am. Rep. 80; *Phoenix Ins. Co. v. Badger*, 53 Wis. 284; *Wallace v. German-American Ins. Co.*, 4 McCrary, 23; *Nurney v. Fireman's Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338. Then, it is well settled by a long line of authorities that the denial of all liability upon other grounds is a waiver even of the condition requiring proofs of loss: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Norwich etc. Ins. Co. v. Western M. Ins. Co.*, 34 Conn. 561; *McBride v. Republic Ins. Co.*, 30 Wis. 562; *Donahue v. Windsor etc. Ins. Co.*, 56 Vt. 382; *Lebanon Ins. Co. v. Erb*, 112 Pa. St. 149; *Zielke v. London Ass. Co.*, 64 Wis. 442; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Ball etc. Co. v. Aurora Ins. Co.*, 20 Fed. Rep. 232; *Carroll v. Girard F. Ins. Co.*, 72 Cal. 297. Under the circumstances, an offer by the plaintiffs to arbitrate would have been an idle act, which "the law neither does nor requires": Civ. Code, sec. 3532.

None of the California cases cited to this point by respondent's counsel are opposed to the position here assumed. In *Old Saucelito L. & D. D. Co. v. Commercial U. A. Co.*, 66 Cal. 253, there was an actual dispute as to the amount of the loss, and plaintiff alleged that it had offered to submit to arbitration; but the court found to the contrary. So in the case of *Adams v. Insurance Companies*, 70 Cal. 198, it appears that the only dispute between the parties was an express dis-

pute as to the amount of the loss. In *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, the difference as to the amount of loss had been submitted to arbitration and an award had been made. The defendant pleaded this award as a limitation upon the amount to be recovered, and the plea was held good.

As it appears from the bill of exceptions that the evidence on the part of the plaintiffs substantially and even strongly tended to prove all the facts necessary to entitle the plaintiffs to recover, I think the judgment of nonsuit was erroneous, and should be reversed, and that the cause should be remanded for a new trial.

BELCHER, C. C., and HAYNE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment of nonsuit is reversed, and the cause remanded for a new trial.

WAIVER OF CONDITIONS IN INSURANCE POLICIES.—Slight evidence will raise a waiver against an insurance company, when the equities are in favor of the assured: *Bonesfant v. Ins. Co.*, 76 Mich. 653; *Germania Ins. Co. v. Klewer*, 129 Ill. 599. In construing policies and conditions therein, courts lean favorably to the assured: *Darrow v. Family Fund Soc'y*, 116 N. Y. 537; 15 Am. St. Rep. 430, and note.

The right of forfeiture for breach of a condition contained in the policy may be waived by the company: Note to *Queen Ins. Co. v. Young*, 11 Am. St. Rep. 61; such as a condition with reference to arbitration after loss: *Nerney v. Fireman's F. Ins. Co.*, 63 Mich. 633; 6 Am. St. Rep. 338; or against false representations of the assured: *Fitzpatrick v. Hartford etc. Ins. Co.*, 56 Conn. 116; 7 Am. St. Rep. 289; *Wilson v. Minnesota etc. F. Ins. Co.*, 36 Minn. 112; 1 Am. St. Rep. 659; or with reference to the manner in which books and papers must be kept: *Brown v. State Ins. Co.*, 74 Iowa, 428; 7 Am. St. Rep. 496; or against encumbrances: *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; or as to the title of the assured in the property insured: *Insurance Co. v. Barnes*, 41 Kan. 161; or against leaving insured property unoccupied: *Germania Ins. Co. v. Klewer*, 129 Ill. 599; or against other insurance: *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275; *Germania Ins. Co. v. Klewer*, 129 Ill. 599; *Johnson v. American Ins. Co.*, 41 Minn. 397; or limiting the time within which suit upon the policy must be instituted: *Bonnert v. Pennsylvania Ins. Co.*, 129 Pa. St. 558; 15 Am. St. Rep. 739; *Horst v. City of London F. Ins. Co.*, 73 Tex. 67; or as to notice and proofs of loss: *German etc. Ins. Co. v. Etherton*, 25 Neb. 506; *Ligon v. Ins. Co.*, 87 Tenn. 341; *People's Ins. Co. v. Puleer*, 127 Ill. 246; *Biddeford Sav. Bank v. Dwelling House Ins. Co.*, 81 Me. 566; *German F. Ins. Co. v. Gueck*, 130 Ill. 345; *Niagara F. Ins. Co. v. Lee*, 73 Tex. 641; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 236-238; or as to furnishing the company with plans and specifications of the building destroyed or damaged: *Ligon v. Ins. Co.*, 87 Tenn. 341. The company waives forfeiture of a policy when, after knowledge of the facts, it assesses and collects premiums or assessments: Note to *Fitzpatrick v. Life Ins. Co.*, 7 Am. St. Rep. 298; *Stylow v. Wisconsin etc. Co.*, 69 Wis. 224; 2 Am. St. Rep. 738, and note.

So the company may so act as to estop itself from insisting upon a forfeiture of a policy: *National Mut. B. Ass'n v. Jones*, 84 Ky. 110; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; *Germania F. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384; *McArthur v. Home L. Ass'n*, 73 Iowa, 336; 5 Am. St. Rep. 684.

WAIVERS BY AGENTS OF THE COMPANY: See note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229-236. A local or soliciting agent may sometimes waive conditions in a policy: *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *Bonenfant v. American F. Ins. Co.*, 76 Mich. 633. A provision in a policy, that no officer or agent of the company shall have power to waive any condition in the policy, unless made in express terms by certain officers in a certain manner, is ineffectual to limit the capacity of an agent to make such a waiver, when acting within the scope of his authority: *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *Wyman v. Phœnix etc. Ins. Co.*, 119 N. Y. 274. But in *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, it is decided that, in the absence of evidence to that effect, it will not be presumed that the soliciting agent of an insurance company, or an adjuster of losses, has the right to waive conditions in policies.

WHO IS AN INSURANCE AGENT: *Kister v. Lebanon M. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 697. Who is a general agent of an insurance company: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 131.

MOORE v. HOPKINS.

[83 CALIFORNIA, 270.]

ABATEMENT OF ACTION — DISMISSAL OF FORMER ACTION. — A judgment of dismissal of a former action, entered after the trial of a second action has commenced, but before its conclusion, is a sufficient answer to a plea in abatement of the second action.

NOTARY'S CERTIFICATE, CONTRADICTION AND DISPROOF OF. — The facts stated in a notary's certificate of acknowledgment to a receipt and release from liability for breach of promise of marriage are only *prima facie* presumed to be true, and can be overcome by any evidence, direct or indirect. Hence the evidence of the party named in the certificate, denying the genuineness or due execution of the receipt and release, may remove the presumption in favor of the facts recited in the certificate.

BREACH OF PROMISE OF MARRIAGE — IMPROPER MOTIVES OF DEFENDANT — INSTRUCTION ASSUMING FACTS NOT PROVED. — In an action for breach of promise of marriage, where the record discloses no sort of improper motive on the part of defendant in entering into the alleged contract of marriage, it is prejudicial error toward him for the court to assume and to intimate to the jury that evidence exists tending to show such improper motive. Therefore, in such a case, an instruction that "a man who enters into a contract of marriage with a woman, with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, for which she is entitled to exemplary damages," is erroneous.

Wilson and Wilson, Samuel M. Wilson, and E. F. Fitzpatrick,
for the appellant.

*Moses G. Cobb, George C. Ross, Henry E. Wills, and James
A. Waymire,* for the respondent.

FOOTE, C. This action was instituted to recover damages from the defendant, based upon an alleged breach of a promise of marriage made by him to the plaintiff. The jury returned a verdict for the plaintiff; from the judgment rendered thereon, and an order denying a new trial, the defendant has appealed.

Among other matters by way of defense, the defendant pleaded in abatement that another action was pending at the time this suit was brought, between the same parties, and for the same cause of action.

It is contended that the judgment of dismissal of a former action between the same parties, and for the same cause, was not admissible in evidence on the trial of the present cause, because, as is claimed, it is no answer to a plea in abatement of a pending action that a judgment of dismissal of the former action is entered after the trial of the second action has commenced, but before its conclusion. This contention, we think, is not well founded. A dismissal of a prior action may be made and judgment entered at any time before the trial of the second action is completed: *Dyer v. Scalmanini*, 69 Cal. 639; *Hixon v. Schooley*, 26 N. J. L. 461, 462; *Averill v. Patterson*, 10 N. Y. 501.

The appellant further urges that the certificate of acknowledgment of a notary public to a release and receipt, such as is here involved, is conclusive as to the facts stated in the certificate, and they cannot be contradicted by the parol evidence of the plaintiff.

The statute under which instruments of the kind under consideration are allowed to be acknowledged provides, among other things: "And the certificate of such acknowledgment or proof is *prima facie* evidence of the execution of the writing": Code Civ. Proc., sec. 1948.

"*Prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence": Code Civ. Proc., sec. 1833.

"Conclusive or unanswerable evidence is that which the law does not permit to be contradicted": Code Civ. Proc., sec. 1837.

"A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect": Code Civ. Proc., sec. 1961.

It therefore appears that the facts recited in the certificate attached to the release and receipt given by the plaintiff to the defendant or his agent, admitted in evidence, are only *prima facie* presumed to be true, and can be contradicted by any evidence, direct or indirect. Wherefore, the instruction asked for by the defendant, viz., "In this case the plaintiff has offered no evidence other than her own which denies either the genuineness of the due execution of the receipt and release in evidence in this case, and I therefore instruct you that her evidence alone is not sufficient to overcome the certificate of acknowledgment of the notary public annexed to said release, and direct you to render a verdict in favor of the defendant,"—was properly refused by the court.

We do not conceive that what we have here said is at all in conflict with the decision in *Banning v. Banning*, 80 Cal. 272, 13 Am. St. Rep. 156, which was in reference to the force and effect of a notary's certificate to a conveyance of a married woman under section 1187 of the Civil Code, which provides that a conveyance by a married woman has no validity unless acknowledged in the manner prescribed by the statute; and the acknowledgment of such a conveyance has been held to be a part of the execution of the instrument itself: *Joseph v. Dougherty*, 60 Cal. 360.

As to the other main contention of the defendant for a reversal of the judgment and order, viz., that the verdict of the jury was for excessive damages, and that a certain instruction granted by the court was misleading, and caused such verdict to be rendered, it may be said with propriety, that, whether the amount of the verdict was excessive or not (about which we express no opinion), it is clear that the jury may have been misled by the following instruction: "A man who enters into a contract of marriage with a woman, with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, for which she is entitled to exemplary damages."

There was no evidence whatever in the record to show that the defendant, if he entered into a contract of marriage with the plaintiff, intended to make any effort to undermine her chastity, or to do any other improper act of that sort. Nor is there any evidence (which the plaintiff's counsel argues to

exist) that he entered into the contract with any levity, or in a heartless way, having the intention to break it off, after amusing and enjoying himself in her society as her betrothed.

There is certainly no evidence proceeding from the defendant that he had any but true and honest motives in the matter, for he says that all his conduct toward her was through "cordial friendship." If, then, his testimony does not show him to be guilty of any improper motive, prompted by levity, deceit, or faithlessness, he certainly cannot be said to have had any such motive; for the plaintiff in the most unmistakable manner stamps him as one not capable of such conduct when she says, "He was a gentleman; there is no mistake about it. He treated me as a gentleman should treat a lady."

Since the record discloses no sort of improper motive on the part of the defendant in entering into the alleged contract of marriage with the plaintiff, it was prejudicial to him for the court to intimate to the jury, as it did, that there was evidence tending to show such improper motive to have been entertained by him. The existence of evidence tending, at least, to show such motive on the part of the defendant is assumed in the instruction, and as no such evidence was before the jury, and no such charge in the pleadings, we must presume that the jury was influenced by the importation of a fact into the case (through the language of the court) which did not appear in the evidence. For this reason, we advise that the judgment and order be reversed.

BELCHER, C. C., and GIBSON, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed.

Hearing in Bank denied.

ABATEMENT OF AN ACTION. — Where one action is pleaded in abatement to a subsequent action, it is essential that the former action be between the same parties, for the same cause and relief, in a court of competent jurisdiction, and still actually pending: Note to *Smith v. Laskrop*, 84 Am. Dec. 452-457. In *Frogg v. Long*, 3 Dana, 157, 28 Am. Dec. 69, it is laid down as well settled, "that if the plea of a prior action depending for the same cause be pleaded, and be true at the time when it was filed, that it cannot be defeated by a subsequent discontinuance of the prior action." But where the purpose, object, and parties in two suits are different, the pendency of one cannot constitute an abatement of the other: *Eaton v. Eaton*, 68 Mich. 53; *Steele v. Grand Trunk etc. R'y Co.*, 125 Ill. 385. In *Moorman v. Gibbs*, 75 Iowa, 537, it was decided that an action to quiet title was not abated by the fact that plaintiff had begun a prior action for the same purpose, which was dismissed before the second action was tried.

THE ACT OF THE OFFICER IN TAKING AN ACKNOWLEDGMENT TO AN INSTRUMENT is sometimes unassailable collaterally, as where he is considered as acting in a judicial character: *Murrell v. Diggs*, 84 Va. 900; 10 Am. St. Rep. 893; *Burson v. Andes*, 83 Va. 448; *Oever v. Manaway*, 115 Pa. St. 338; 2 Am. St. Rep. 552, and note. The acknowledgment of a married woman can be impeached by showing that she never appeared before the acknowledging officer at all: *Pickens v. Knischy*, 20 W. Va. 1; 6 Am. St. Rep. 622, and collection of cases cited in note.

INSTRUCTIONS UPON MATTERS NOT PROVED, not disputed, nor involved in the case are erroneous: *Comes v. Chicago etc. R'y Co.*, 78 Iowa, 391; *Seebel v. Norman*, 78 Iowa, 255; *Everingham v. Lee*, 78 Iowa, 630; *Scott v. Chicago etc. R'y Co.*, 78 Iowa, 99; *Richards v. Knight*, 78 Iowa, 69. So an instruction which assumes and treats as facts such matters as are really in dispute is erroneous: *State v. Potts*, 78 Iowa, 656.

ESTATE OF STEVENS.

[83 CALIFORNIA, §22.]

ESTATES OF DECEDENTS — GIFT TO WIDOW PERSONALLY NOT CHARGEABLE AGAINST HER AS EXECUTRIX. — A gift to a widow personally by the employer of her deceased husband of an amount equal to his salary for two months, if he had lived, cannot be charged against her as executrix and as part of the husband's estate, when the intent of the donor to make the gift to her alone is clear and without doubt. It is immaterial that she did not know whether it was a gift to her or not.

GIFTS. — **DONOR OF GIFT MAY REGULATE HIS DISPOSAL,** and designate the donee.

ESTATES OF DECEDENTS — ALLOWANCE FOR SUPPORT OF WIDOW. — The widow of a decedent is entitled to a reasonable allowance for her support. The court, in making this allowance, should take into consideration all the circumstances bearing upon the reasonableness of the amount allowed, regard being had to the mode in which she lived during the lifetime of her husband, and the sufficiency of the estate to pay the amount allowed. The court is not bound to limit such amount to a bare support of the widow.

ESTATE OF DECEDENTS — PROFITS OF RENTED HOUSE NOT CHARGEABLE AGAINST EXECUTRIX. — The widow of a decedent is not chargeable as executrix with profits received from renting rooms in a house rented by her, the rental of which is paid out of her monthly allowance, when the court, in making such allowance, considered evidence to the effect that the rental of such house, as paid by the executrix, was the same in amount as that paid by her husband during his lifetime.

ESTATES OF DECEDENTS — ALLOWANCE FOR SUPPORT OF WIDOW — POWER OF COURT GRANTING, TO REVIEW. — When the court has granted an order making an allowance for the support of a widow of a decedent, and the time in which an appeal from such order may be taken has been allowed to pass, the court cannot review the order. Its power over it is at an end, though it may be that if the court was imposed upon by a studied withholding of facts bearing upon the subject-matter of inquiry, it may so change the order as to make it conformable to what would have been a fair determination on the facts withheld being made to appear.

WILLS — OMISSION OF NAME OF CHILD. — DECLARATION OF INTENT of a testator to disinherit a child whose name is omitted from his will is inadmissible. Such intent must appear from the words of the will.

WILLS. — TO DISINHERIT A CHILD WHOSE NAME IS OMITTED FROM A WILL, an intention so to do must appear from words on the face of the will indicating such intent directly, or by implication equally as strong that the testator had the child omitted in his mind, and so having him, had omitted to make any mention of him.

ADOPTION — POWER OF LEGISLATURE — CONSTITUTIONAL LAW. — The legislature has full and exclusive power in matters of adoption, and may invest any person, officer, or court, with the power of receiving, witnessing, and declaring the adoption, as well as prescribe what the ceremony shall be and before whom it is to be celebrated. When the power of adoption is vested in a county judge, his act in the matter is one of judgment, and in that sense judicial, but is no part of the judicial power mentioned in the constitution, and by it vested in the courts.

S. C. Denson, and C. H. Oatman, for the appellant.

Catlin and Blanchard, for the respondent.

THORNTON, J. Appeal by executrix, Lydia M. Stevens, from a judgment settling her accounts as executrix of the above-named decedent.

The appellant is the widow of the testator. The testator died on the 11th of February, 1888, and she was appointed and qualified as executrix of the last will of the testator on the 17th of March following. The testator was for many years prior to his death in the employment of the Southern Pacific Company as its general master-mechanic, at a salary of five hundred dollars per month. He had drawn his salary for the month of January, 1888, and his full salary for the month of February was paid in the usual mode, without any deduction on account of his death, on the eleventh day of that month. On the 17th of June, 1888, the sum of one thousand dollars was paid Mrs. Stevens by the company. On application of May S. Hubbard, Mrs. Stevens was charged with this sum as part of the estate of her testator. This is assigned here as error.

On consideration of the evidence, we are of the opinion that the point is well taken. It was paid to Mrs. Stevens on a voucher, of which the following is a copy:—

“SOUTHERN PACIFIC COMPANY,

“SAN FRANCISCO, June 7, 1888.

“To MRS. A. J. STEVENS, DR.

“For amount allowed, which would equal the salary of the late A. J. Stevens, Esq., for the months of March and April, 1888, two months, at five hundred dollars,—one thousand dollars.

[Cal

"SAN FRANCISCO, June 11, 1888.

254 "SAN FRANCISCO, June 11, 1880.
"Received from Southern Pacific Company one thousand
dollars in full for above account.
"MRS. A. J. STEVENS."
Witness: among others

[Signed]

"MRS. A. J. STEVENS."

There are several indorsements in this paper; among others, these: "Name, Mrs. A. J. Stevens"; "For allowance."

There are several indorsements in the voucher, to-wit: "For allowance, three: 'Name, Mrs. A. J. Stevens'; 'For allowance, an allowance by the company. There was no obligation on the company to pay it. It was clearly a gift by the company. The allowance is clearly to Mrs. Stevens. The language used is 'To Mrs. A. J. Stevens, Dr.'; not to Mrs. Stevens, executor or as executrix of her deceased husband. It does not appear to be in salary. The amount is fixed by the salary which the master would have earned had his services continued during the months named in the voucher. The salary is \$100.00 per month for the purpose of fixing the amount. There is no other evidence changing this purpose except the fact that the voucher is not signed by the company.'"

It is all consistent with the fact that the gift was made to Mrs. Stevens personally, and the evidence clearly shows. It was intended by the donor as a grateful recognition of the services of one who was devoted and faithfully, to whom its representatives were deeply attached, and was with great probability the one of all the world who most felt his loss. It is a tribute that Mrs. Stevens did not know of, and it was a gift to her or not. It was all the more graceful because the fact that it was a gift was veiled from her. It was made to her in the mode employed that she was not to be embarrassed in accepting it. It thus shocked her feelings and the gift was enhanced in her estimation as a tribute to the worth of the person to whom it was the cherished object of honor.

...the sum of two hundred dollars designated.

the sum of two hundred and thirty dollars was designated.

It appears, from the bill of exceptions, that Mrs. Stevens lived in a hired house, for which she paid the monthly rent of fifty-five dollars, and that she had, during the period for which this allowance was made, rented out rooms in the house, for which she received the sum of three hundred dollars.

With this last sum she was charged as executrix by the court below.

It is urged that this charge was erroneous, and we are of that opinion.

The widow is entitled to a reasonable provision for her support, to be allowed by the superior court, or a judge thereof: Code Civ. Proc., sec. 1464. In making this allowance the court must take into consideration all the circumstances bearing upon the reasonableness of the amount to be allowed. No doubt this was done in this case. The court is not restricted in making this allowance to a bare support of the widow. Regard should be had, and no doubt was had, to the mode in which she lived during the lifetime of her husband. Such regard should be had in a case like this, when it appeared without doubt that the estate was amply sufficient to pay the amount allowed. We say no doubt this was done when the court originally determined what the allowance should be. It appears further, from this bill of exceptions, that, on the hearing at which this allowance was made, the court, among other things, heard and considered evidence to the effect that the rental of the house which was being paid by the executrix was the same paid by the deceased husband in his lifetime, and that the rooms were rented by the executrix during the time she was receiving this allowance.

The court, having considered all these facts, made the order of allowance.

Why should not this order be held final, unless facts not disclosed to the court when the order was made subsequently are brought to the attention of the court? The order is appealable (Code Civ. Proc., sec. 963, subd. 3), and we are of opinion it should be regarded as final. On an appeal from the order of allowance, all these facts could have been brought to the attention of this court, the ruling reviewed, and the error, if any, corrected. The time for appeal was allowed to pass, and under such circumstances the power of the court over its order is at an end. The court below cannot sit as an appellate court to review its own orders.

It may be that if it had appeared that the court below had

been imposed on by a studied withholding of material facts bearing on the subject-matter of inquiry, the court might deal with the order, and change it so as to make it conformable to what would have been a fair determination on the facts withheld being made to appear. But there is no such case before us; all the facts on which the court acted were before it when it first acted. Under these circumstances, we think the charge which involved a change in the order should not have been made.

We add, nor do these facts show that the order of allowance when originally made was not reasonable. It was none the less reasonable because the widow elected to deprive herself of comforts or conveniences to which she was entitled, and in the exercise of a judicious and commendable frugality have incremented her income by hiring to others some of her income. This does not show, or tend to show, that the court below in its order of allowance lent any countenance to a needless waste of the estate then in the course of administration.

There is also an appeal in this case from the judgment distributing one fourth of the estate to Mrs. May S. Hubbard.

Mrs. Hubbard's claim is based on the fact that she was unintentionally omitted from the will of her father, the decedent above named.

The will, which was olographic, is as follows:—

"Considering the uncertainty of life, being of sound mind, and enjoying good health, I make this my will. I will to my wife, Lydia M. Stevens, all of my property, of every kind and nature. Also, all moneys that may become due at my death, as insurance policies held by me in any life insurance company or association.

"She is to collect, for her sole use and benefit, all moneys that may become due at the time of my death, or that may become due thereafter.

"I request, however, that she will set aside and cause to be invested in some good and safe interest-paying sureties one thousand dollars (\$1,000) for the benefit of my grandson, William A. Stevens, both principal and interest accumulations to be paid to him when he shall have arrived at the age of twenty-one years; but in this matter my wife may use her own judgment.

"I appoint my wife, Lydia M. Stevens, sole executrix of my estate, to act without bonds.

"ANDREW JACKSON STEVENS.

"SACRAMENTO, September 22, 1885."

At the time the will became operative by the death of the testator, in February, 1888, the following section of the statutory law of the state was in force. The section referred to is embodied in the Civil Code and numbered therein 1307.

"When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section."

Mrs. Stevens offered to show by the declarations of the testator, made contemporaneously with the writing and execution of his will, that his children were intentionally omitted.

The argument that the intent of the testator is apparent on the face of the will; that the will clearly discloses his intent to leave his entire estate to his wife, and thus displaces any intent to leave it to any one else, and that those declarations are consistent with the intent disclosed by the words of the will, and do not alter or add to the will in any respect,—has great weight. It does seem to be illogical to declare that the intent of the testator must be declared in the will, and still that you cannot show any fact or declaration consistent with and supporting that intent. But this court, in April, 1868 (see *Matter of Estate of Garraud*, 35 Cal. 339), held that such declarations were inadmissible under a statute then in existence substantially the same, in fact almost identical in words with the one in operation when the will involved in this case was executed.

The precise question made here has not arisen in this state since the case of Garraud's estate was decided. It has been accepted as a sound and correct exposition of the law ever since it was decided, as is apparent from *Estate of Utz*, 43 Cal. 201; *Bush v. Lindsey*, 44 Cal. 121; and *Estate of Wardell*, 57 Cal. 484. *Pearson v. Pearson*, 46 Cal. 609, was on another section of the statute. The case of *Wilson v. Fosket*, 6 Met. 400, 39 Am. Dec. 736, is much relied on by counsel for appellant. That case was commented on in the case in 35 California, and shown, as clearly appears, to have been decided on a statute very different from the statute in this state; as was *Whittemore v. Russell*, 80 Me. 297; 6 Am. St. Rep. 200. This last case seems to have been rested very much on the authority of *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736.

In line with the decision in Garraud's estate are *Bradley v.*

Bradley, 24 Mo. 311; *Pounds v. Dale*, 48 Mo. 270; and *Chace v. Chace*, 6 R. I. 407; 78 Am. Dec. 446. Each of these cases just cited refers to and comments on *Wilson v. Fosket*, *supra*, as rested upon the peculiar language of the Massachusetts statute.

The decision of this court in Garraud's case has stood too long without challenge to be overruled without very strong reasons. It is sustained by very powerful reasoning in the able opinion of Justice Crockett. We think it our duty to follow it, and in accordance with the rule there declared we must hold that the court below did not err in excluding the offered declarations of the testator.

It is further argued that the will itself shows on its face that the omission of Mrs. Hubbard in the will was intentional. As to this contention, we think that the significance of the decision of this court in Garraud's estate is, that it must appear on the face of the will, and it must then appear from words which indicate such intent directly, or by implication equally as strong. Any other rule would lead to guesses or to inferences merely conjectural, which would be too unsubstantial to base a judgment on. We do not think that we can say with any reasonable certainty that the words used in the will indicate that Mrs. Hubbard was in the mind of the testator when he wrote his will, and that he intentionally omitted to mention her. We think that the correct rule is, that the words of the will must show, as above pointed out, that the testator had the person omitted in his mind, and having her so in his mind, had omitted to make any mention of her.

The rule here laid down is plain and simple, and we think in accordance with the statute, as interpreted in the Garraud case. It is an easy matter to put the question beyond a doubt by naming the children or grandchildren in the will, with a nominal legacy, or none at all, from which it will clearly appear that these persons are in the mind of the testator, and therefore the omission to leave them anything must have been intentional.

We are of the opinion that the court below did not err in holding that the will itself did not show on its face that the omission of Mrs. Hubbard was intentional.

We add that we have examined the cases cited by counsel on the point just discussed, and make no further allusion to them, for the reason that, on questions of mere construction, one case, unless in all respects similar to the case under dis-

cussion, cannot be regarded as an authority. None of the cases cited are similar to the case here.

Another point remains to be considered.

In 1878, Andrew D. Billings, son of May S. Billings (the May S. Hubbard, a party to this case) and her then husband, A. D. Billings, was, with all the forms of law required by division 1, part 3, title 2, chapter 2, of the Civil Code, adopted by the testator and his wife as their child. The adoption was made before Hon. R. C. Clark, county judge of Sacramento County.

It is here contended that the statute under which this adoption was made is unconstitutional.

It is said that the adoption of the child was a judicial act, and therefore must be done by a court, and cannot by the constitution be done by a judge, as was the case here.

The adoption of children is purely a matter of statute, pertaining to the legislature, with which a judge or a court has nothing to do, unless the power is conferred on them by statute. The matter of adoption belongs to the legislative, and not to the judicial, department of the government.

We know of no rule of law which ever enabled any person or tribunal, whether notary public, clerk of a court, judge, or court, to perform the ceremony of adopting a child, unless such authority was conferred by a legislature.

As the legislature has full power over this matter, it may invest any person or officer or court with the power of receiving, witnessing, and declaring the adoption. It may prescribe what that ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and filing such paper with a public officer. These rules are so evident that it is unnecessary to refer to any authority to sustain them. The authorities on the subject are abundant: See *Abney v. De Loach*, 84 Ala. 393; *Succession of Vollmer*, 40 La. Ann. 593.

The case of *Spencer etc. Co. v. Vallejo*, 48 Cal. 70, related to the exercise of the right of eminent domain, which can only be exercised through the medium of a court. The exercise of the right of eminent domain has always been had by means of courts invested with judicial power. It has never been exercised otherwise in England or any of the states of the American Union, that we are aware of. The exercise of this power may be regulated and restricted by the legislature, but its exercise

is to be had through the judicial tribunals of the country. The case referred to, involving in its very essence the exercise of the judicial power vested in courts by the constitution, is no authority in this case, where no judicial power is called for, and the whole matter is intrusted by a valid law to a designated officer or person: *Weber v. County of Santa Clara*, 59 Cal. 265; *Trahern v. San Joaquin Co.*, 59 Cal. 320.

It may be and is true that the county judge in this case must have exercised judgment, and was authorized by the statute to employ his judgment. This may be so, and in such case the act is one of judgment, and in that sense judicial; but this does not make it any part of the judicial power spoken of in the constitution, and by it vested in courts. The distinction is pointed out in *People v. Oakland Board of Education*, 54 Cal. 377.

It may be conceded that the legislature could have made this adoption a judicial case, and the jurisdiction over it conferred on a court. It may be further conceded that then the exercise of the power by the court would have been an exercise of the judicial power vested in it by the organic law. But the legislature has been careful here to place this jurisdiction in a person designated as county judge, and has not conferred it on a court. The legislature has done all in its power to signify that it was not dealing with any matter pertaining to the judicial power or the judicial department by investing a county judge with jurisdiction over the matter.

The court below erred in holding the statute in regard to adoption unconstitutional and void. A. D. Billings was legally adopted by Mr. and Mrs. Stevens, and has all the rights springing from such adoption.

The judgment or decree of the court below is reversed, and the cause remanded, to be proceeded with in accordance with the views expressed in this opinion.

So ordered.

ADOPTION OF CHILDREN. — To make an adoption decree valid, the court must have jurisdiction over the child, his natural parents, and the persons adopting the child: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808.

OMITTING NAME OF CHILD IN WILL. — As to the rights of a child whose name has been omitted from its parent's will, see extended note to *W'ilson v. Fosket*, 39 Am. Dec. 740-744; *Gerrish v. Gerrish*, 8 Or. 351; 34 Am. Rep. 585; *Peters v. Siders*, 126 Mass. 135; 30 Am. Rep. 671; *Doane v. Lake*, 32 Me. 268; 52 Am. Dec. 654; note to *Whittemore v. Russell*, 6 Am. St. Rep. 203.

GIFTS. — FOR THE ESSENTIAL ELEMENTS OF A VALID GIFT, see *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531, and particularly note.

[IN BANK.]

QUAN WO CHUNG COMPANY v. LAUMEISTER.

[83 CALIFORNIA, 334.]

RESTITUTION OF POSSESSION OF LAND UNDER REVERSED JUDGMENT. — Where a party has been wrongfully dispossessed of land by order of a superior court, which upon appeal is reversed, and restitution of possession directed, such restitution cannot be prevented by a third person, who has gained peaceable possession under title derived from an independent source, and adverse to both parties to the suit, and who is not in collusion with either.

RESTITUTION OF POSSESSION — WRONGFUL DISPOSSESSION BY AGENCY OF COURT. — The rule that plaintiff in an action to recover the possession of land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding, holding possession under an independent title or claim of title, and not in collusion with defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of a court.

MANDAMUS WILL LIE TO COMPEL A SHERIFF TO ENFORCE AN ORDER OF RESTITUTION of possession of land, issued upon appeal in a case where a party has been wrongfully dispossessed through the agency of a superior court, though, in the mean time, a third person, not in collusion with either party to the suit, has gained possession of the premises, claiming a title derived from an independent source.

CONFLICT OF JURISDICTION — ORDER OF SUPREME COURT CONTROLS. — The execution of an order of restitution of possession of land issued upon appeal cannot be enjoined by the superior court. The order of the supreme court must control, and any conflicting order from the superior court must be disregarded.

APPLICATION for a writ of *mandamus* to a sheriff.

James F. Smith, for the petitioner.

Dorn and Dorn, and Wilson and Wilson, for the respondent.

BEATTY, C. J. This is a proceeding by *mandamus* upon the following case:—

In an action to recover possession of certain real property situate in San Francisco, in which one Lee Chuck was plaintiff and the above-named petitioners were defendants, the superior court rendered a judgment in favor of the plaintiff, whereupon a writ of restitution was issued, under which petitioners were ejected from the demanded premises, and said Lee Chuck placed in possession. The petitioners afterward moved the superior court to restore them to possession, on the ground that the writ of restitution had been wrongfully executed by the sheriff after stay of proceedings granted. This motion was resisted by Lee Chuck and denied by the superior court, but on appeal to this court the order was reversed. "with

directions to the superior court to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendants": *Lee Chuck v. Quan Wo Chung Co.*, 81 Cal. 222; 15 Am. St. Rep. 50.

The *remittitur* upon this judgment was filed in the superior court December 21, 1889, and an order was thereafter made in conformity to the mandate of this court.

But when the sheriff, the respondent here, was about to execute the order, he was met by the claim of a Chinese firm calling itself the Kwong Lun Hing Company, that they were rightfully in possession of the property under title adverse to both parties in the suit, and not in collusion with Lee Chuck. In consequence of this claim, and threats of an action for damages, the sheriff refused, or at least failed, to execute the order to restore the petitioners to possession, and this proceeding was thereupon commenced to compel him to do so.

An alternative writ of mandate was issued, to which the sheriff makes return, showing the facts above stated, among other things, and also the fact that a suit has been commenced in the superior court of San Francisco by or on behalf of said Kwong Lun Hing Company to enjoin him from executing said order, in which case a temporary injunction has been issued and served upon him, the question of making it permanent being held under advisement by the judge of the superior court.

Beside these proceedings, various other steps have been taken by said Kwong Lun Hing Company, all designed to frustrate the execution of the order of this court to restore the petitioners to the possession of the premises from which they were, by the agency of the superior court, wrongfully ejected. It is not necessary, however, to recapitulate these various devices, and we shall content ourselves with noticing the position upon which the Kwong Lun Hing Company bases its claim of right to keep possession of the disputed premises.

They say they were not parties to the action of *Lee Chuck v. Quan Wo Chung Co.*, 81 Cal. 222, 15 Am. St. Rep. 50, and therefore are not bound by the judgment, or any orders made therein; that they are peaceably in possession of the premises under title derived from an independent source, and cannot be ejected except in consequence of a proceeding to which they are made parties, and in which they may have their day in court to litigate their rights. In support of this proposition, they cite us to numerous cases in which it has been held that

the plaintiff in an action of ejectment or other suit to recover possession of real property cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title, and not in collusion with the defendant.

But these cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the court. He does not stand in the position of the actor in a suit who seeks the aid of a court to regain a possession lost by his own negligence or misfortune. On the contrary, he is out of possession only because the court has wrongfully put him out, and whoever is in is there only because the court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the court, and therefore no injustice is done in restoring the party wrongfully dispossessed, without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after being put out by the court than he would have been in if the court had never acted; and the court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession, he can, after going out, assert it with the same effect as if he had never been in, and he loses nothing but the advantage of holding the premises pending the litigation, — an advantage to which he was never entitled.

It must be understood, therefore, that our order remanding the case of *Lee Chuck v. Quan Wo Chung Company*, 81 Cal. 222, 15 Am. St. Rep. 50, meant precisely what it said, — neither more nor less, — viz., that the defendants in that action — petitioners here — were to be restored to the possession of the property in controversy, and that any other party who might have got in pending the litigation, whether by collusion with Lee Chuck, or otherwise, must be put out.

As to the injunction issued by the superior court, restraining the respondent from executing the order entered in pursuance of our judgment in the appeal case, we assume that it was issued in consequence of an erroneous construction of that judgment, and that it will be vacated upon the rendition of our decision herein; but however that may be, the order of this court must control, and any conflicting order from the superior court must be disregarded.

It is ordered that the peremptory writ issue as prayed for by petitioners forthwith.

RESTITUTION OF PERSONS DISPOSSESSED UNDER A JUDGMENT AFTERWARDS SET ASIDE OR REVERSED. — Whenever a party is put out of the possession of land, and the proceedings are subsequently adjudged void, reversed, or set aside, an order for a writ of restitution is deemed a part of the judgment of the appellate court: *Perry v. Tupper*, 70 N. C. 538; *Watson v. Trustees*, 2 Jones, 212; *Perry v. Tupper*, 71 N. C. 385-387; *Lytle v. Lytle*, 94 N. C. 522; *Mewney v. Wright*, 84 N. C. 336; *Hall v. Wells*, 54 Miss. 289; *Shaw v. Fleming*, 5 Houst. 155; *Fish v. Toner*, 40 Minn. 211. In *Perry v. Tupper*, 71 N. C. 385-387, the court decided that where the defendant in forcible entry and detainer had been put out of the possession of land by an abuse of the process of law, and the appellate court had ordered the superior court to issue a writ of restitution, it should be issued as matter of course, unless some new matter had intervened in the mean time; and until the possession is restored to the defendant, the court will not entertain an application for an injunction, or pass upon the further rights of the parties. In this connection the court said: "The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not till then, will the court be in condition in which it can, honorably to itself, pass upon the further rights of the parties." And again, in *Lytle v. Lytle*, 94 N. C. 522, the court said: "It is well settled that where a party is put out of the possession of land in pursuance of a judgment or order improvidently granted, and the judgment is afterward declared void or set aside, the court will promptly, as far as practicable, restore the party complaining to the possession of the land. The law forbids injustice, and it will not allow its process to work injury to a party against whom it goes by improvidence, mistake, or abuse. It will always restore such party promptly, and place him as nearly as may be in the same plight and condition as he was before the process issued."

When a writ of restitution in a process of forcible entry and detainer has been executed, and the proceedings are afterwards quashed on *certiorari*, the court has power to award a writ of restitution: *Commonwealth v. Bigelow*, 3 Pick. 21. If an action of unlawful detainer is dismissed for failure of plaintiff to enlarge his possession bond as required by the court, the defendant is entitled to judgment for restitution of possession: *Runyon v. Hall*, 10 Ark. 476. So when, in proceedings relating to the unlawful detainer of lands, the plaintiff recovers judgment and the possession of the premises, but on appeal the action is dismissed on his motion, it is proper in the judgment of dismissal to award restitution of possession to the defendant: *Harlem v. Scott*, 2 Scam. 65; *Fish v. Toner*, 40 Minn. 211. In the latter case the court said: "The plaintiff recovered possession from the defendant only through the judgment. Upon the case being appealed to the district court, the cause became *lis pendens* in that court. The plaintiff, who was respondent in that court, should not be heard to ask and obtain the dismissal of his action, and at the same time retain the property which he had acquired only by means of the judgment, upon which alone, so far as appears, his right of possession rested. But the result would be the same whether the action was dismissed upon the motion of plaintiff, or for any other sufficient cause. This was the same action in which judgment of restitution had been rendered. Upon the dismissal of the action the judgment could no longer stand, and the property, which had been delivered to the plaintiff only by force of the judgment, should be restored." If, in an action of forcible entry and detainer, plaintiff has judgment, and is placed in possession of the land by writ of restitution,

but on appeal there is a verdict for the defendant, the court has power, after reversing the judgment, to award defendant a writ of restitution, if a writ is necessary to perfect the jurisdiction of the court over the subject: *Kennedy v. Lee*, 19 Cal. 374.

A defendant in forcible entry against whom judgment is rendered, which is afterwards reversed on appeal, but who does not lose possession of the property under or through the judgment, is not entitled to be restored to possession as against third persons who have ousted him during the pendency of the action: *Bowers v. Cherokee Bob*, 46 Cal. 280. So it is within the discretion of the court to refuse a writ of restitution to defendant on reversing a judgment of a justice's court against him in forcible entry and detainer under which judgment plaintiff obtained possession, if it appears that plaintiff was entitled to the possession, and had been wrongfully dispossessed by defendant at a prior time, though he is not entitled to recover possession in this particular action: *Towle v. Smith*, 27 Wis. 268. Though an execution issued on a judgment in favor of the complainant in forcible entry and detainer is levied after a *superedeas* by writ of error, yet the court, in the exercise of sound discretion, may refuse to order restitution of the estate so levied upon, where it appears, from the record, that the complainant was forcibly dispossessed by the party moving for restitution: *Dutton v. Tracy*, 4 Conn. 79. Or in a case showing that the issuance of a writ of restitution would work manifest injustice and oppression, it will be refused: *Watson v. Trustees*, 2 Jones, 211.

As to whether the writ of restitution on reversal of the judgment should issue out of the court of original jurisdiction, or out of the appellate tribunal, the court in *Hall v. Wells*, 54 Miss. 289-307, said: "If, in this case, the record showed that the defendant had been ejected from the premises by process before the reversal, it would have been in the power of this court, and its duty, to have incorporated in its judgment an award of restitution. The appellate court has inherent power, upon reversal of a judgment for a chattel or for the possession of land, to award restitution, and the issuance of execution therefor. Under our practice, final process is ordinarily issued by the court of original jurisdiction, founded on the mandate of this court. This judgment, it seems, was not superseded; and the plaintiffs in the circuit court, it is suggested in the motion, enforced the judgment by final process. If that has been done, the plaintiff in error ought to be restored to the possession. The only difficulty about the matter is, whether the relief should come from this court or from the circuit court. The authorities agree that the appellate court may award the writ if the case before it shows a deprivation of possession. If, however, that fact must be brought to the notice of the court by proof *dehors* the record, the method is to give the plaintiff below notice; and to that end the aggrieved party may take out *scire facias*, warning him to appear and show cause why he should not have the writ of restitution. In those systems where the appellate court, through its own process, carries out to full completion its own judgments, it might be proper to award the *scire facias*; but in this state, the mandate goes from this court to the circuit court, and the proper process is issued from that court. It seems to us that the better practice would be, in cases circumstanced like this, to sue out the *scire facias*, returnable in that court, and on proof of ejection from the land, to have a judgment awarding the writ of restitution."

The same doctrine is maintained in *Vroman v. Dewey*, 23 Wis. 626, where it is decided that when, after a judgment in the circuit court for plaintiff in ejectment, he is put into possession by an officer before an appeal is perfected,

and afterwards the judgment is reversed, and a new trial awarded, defendant cannot have a writ of restitution from the appellate court, but must have the cause remitted, and proceed in the court having original jurisdiction, by applying to that court to have possession restored to him; and to the same effect is *Market Nat. Bank v. Pacific Nat. Bank*, 102 N. Y. 464. The proper practice in New York, under the code of procedure, seems to be that when a regular judgment is entered giving the plaintiff possession of real property, and execution is issued putting him in actual possession, or setting aside the judgment and execution, the proper remedy of the defendant to compel restoration of the premises is to apply to the special term of the court for an order to show cause why the possession should not be restored to him, and an order granted on the hearing of the order to show cause why possession should not be restored to him is sufficient authority to restore the possession to the defendant, and disobedience to such an order may be punished as for a contempt: *Dawley v. Brown*, 43 How. Pr. 17. On the question of restitution of property upon the reversal of a judgment under which sale has been made, see the note to *Little v. Bunce*, 28 Am. Dec. 368-372; and as to the service of the writ, and who may be dispossessed thereunder, consult the note to *Lee Chuck v. Quan Wo Cheng Co.*, 15 Am. St. Rep. 56-61.

[IN BANK.]

EX PARTE SPENCER.

[83 CALIFORNIA, 460.]

DIVORCE — ALIMONY — PERMANENT ALLOWANCE. — Alimony, in its strict legal sense, and as used in section 137, Civil Code of California, proceeds only from husband to wife, and as a means of support for her *pendente lite*. Therefore, after divorce, there can be no alimony; but the permanent allowance provided for in section 139 of such code which may be given the wife after divorce for an offense of the husband is not alimony, nor a mere substitute for the wife's interest in the community or separate property of the husband. It is given the wife as compensation for the wrong done to her by the husband.

DIVORCE — PERMANENT ALLOWANCE FOR SUPPORT OF WIFE. — When a divorce is granted for the offense of the husband, the court may, under section 139, Civil Code of California, independent of the property then *in esse*, compel him to pay out of his future earnings a suitable monthly allowance for the support of the wife during life, or for a shorter period, having regard to their circumstances, the husband's earnings, or ability to earn money, by way of compensation to the wife for deprivation growing out of his own wrong. Such allowance may be increased or diminished as, in the opinion of the court, the changed circumstances of the parties may warrant.

DIVORCE — PERMANENT ALLOWANCE TO WIFE — CONTEMPT OF HUSBAND IN NOT PAYING. — When the court granting a divorce has ordered the husband to pay a permanent monthly allowance for the support of his divorced wife, it may imprison him for contempt for violation of its order. His only remedy is to purge himself of such contempt by showing, to the satisfaction of the court, that he is unable to obey the order, and that his inability has not been caused by his own act for the purpose of avoiding

payment. When imprisoned for violation of such order, he is not entitled to his discharge upon *habeas corpus*, if the court, finding him able to pay the allowance, has jurisdiction as shown by the record.

Franklin P. Bull, for the petitioner.

Dorn and Dorn, for the respondent.

FOX, J. This is an application for discharge upon *habeas corpus*. The return to the writ shows that the respondent is imprisoned under an order of the superior court of the city and county of San Francisco, made upon conviction for contempt, in refusing to obey an order of the court theretofore made, requiring him "to pay the sum of twenty-five dollars per month as alimony," to Josephine M. Spencer, his former wife.

From the return and records introduced, it appears that on August 25, 1884, in the suit of Thomas M. Spencer, plaintiff, v. Josephine M. Spencer, defendant, a decree of divorce was granted to the defendant, upon her cross-complaint; the custody of a minor child was awarded to her; the household goods and personal property at the residence occupied by her were set apart to her; and it was further decreed that the plaintiff should pay to the defendant, "as permanent alimony, the sum of fifty dollars per month, on the first day of September, 1884, and on the first day of each and every month thereafter." On May 13, 1887, on the motion of plaintiff, this decree was modified, and the amount of alimony so fixed reduced to twenty-five dollars per month. In December, 1888, petitioner having failed for some time to make payment, he was cited to appear before the court and show cause why he should not be punished for contempt. On the return day of that citation the defendant, this petitioner, was examined under oath touching his ability to pay the moneys so required of him, and his reasons for not paying the same, and the court found that there was then due and unpaid the sum of \$225; that demand therefor had been made; that he had been, and was, abundantly able to pay the same; and that he had permanent and lucrative employment. Upon these findings the court adjudged him guilty of contempt, and ordered that he be committed to the custody of the sheriff, and confined in the county jail until he obeyed the said order and paid the said sum of \$225, so found due and unpaid under said decree, or until discharged according to law.

These proceedings seem to have been regular, and in accord-

ance with the provisions of title 5, part 3, of the Code of Civil Procedure. And the order of imprisonment was in accordance with the provisions of section 1219, a part of that title, the court having found that the party convicted was able to make the payment required of him, and consequently that it was in his power to perform the act required. It is insisted here, however, that the court erred in this finding; that there was no evidence to support it. That is a matter into which we cannot inquire upon this writ. Under the writ the court can only inquire into the jurisdiction to find, not into the correctness of the findings upon which the conviction is based.

The only remaining inquiry is, whether the judgment or order which the petitioner is found guilty of having disobeyed was a lawful judgment or order.

Upon this point it is insisted that in divorce proceedings, when the court reaches its final judgment, and grants a decree of divorce under our statutes, dissolving the bonds of matrimony, it has no jurisdiction or power to decree the payment of permanent, or indeed an future, alimony; that the only provision on the subject of alimony is that found in section 137 of the Civil Code, and relates entirely to what may be done *pendente lite*; that alimony grows out of that obligation of support which arises from the relation of husband and wife, and proceeds only from husband to wife; that the moment the decree of divorce is granted the relation of husband and wife has ceased; there is then no husband, no wife, and hence there can be no alimony.

It is true that alimony, in its strict technical sense, proceeds only from husband to wife, and that where the relation of husband and wife does not exist, strictly speaking there can be no alimony. It is true, also, that the legislature has used the term only in its strict legal sense, and has therefore used the word "alimony" only when prescribing the provision which the court might make for the support of the wife *pendente lite*. But the courts have not always been as careful in their use of the word. They have frequently used it as a mere name for another and different allowance, made, and authorized to be made, under section 139 of the Civil Code. It was manifestly so used in this case, and has been so used in many others. By that section it is provided: "Where a divorce is granted for an offense of the husband, the court may compel him to . . . make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court

may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

That is exactly what the court did in this case, falling, however, into the quite common error of calling the allowance "permanent alimony." If such an allowance is lawfully made, the simple misnomer of it would not justify a court, even upon appeal, much less under this writ, in setting it aside. If it was excessive, or if the court erred in determining that it was a case in which such an allowance is authorized by law, the error was one to be corrected on appeal, not one to be set aside as for want of jurisdiction to make it. Under the code, which must "be liberally construed with a view to effect its object and to promote justice" (sec. 4), the court will look at the substance of the thing, and not defeat its object merely because somebody has misnamed it. Alimony rests upon the obligation of the husband to support the wife; allowance for future support has been held to be in consideration of and as a substitute for her interest in the community property, or her right of dower or inheritance in the property of the husband, but under our code it is something more, and something which the legislature had a right to authorize and the court to grant,—compensation for a wrong done to her. It will be observed that this allowance cannot be made when the divorce is granted for the offense of the wife,—only when it is for an offense of the husband; so expressly provided by the statute, and so held in *Everett v. Everett*, 52 Cal. 383. It proceeds upon the theory that the husband entered upon an obligation which, among other things, bound him to support the wife during the period of their joint lives, and gave to her a right to share in the fruits and accumulations of his skill; that by his own wrong he has forced her to sever the relation which enabled her to enforce this obligation, and for the wrong which thus deprived her of the benefit of the obligation he must make her compensation. The court is to fix the measure of that compensation by "having regard to the circumstances of the parties respectively"; those circumstances furnishing the best means for determining the extent of her loss. As these circumstances may differ at different times, "the court may, from time to time, modify its orders in that respect."

This allowance may be entirely independent of the property then *in esse*. It is the duty of the court, at the time of dissolving the marriage, to make proper division of the community

property (secs. 146, 147), and, as we understand the law, it may, under section 139, in its discretion, compel the husband, in addition, to make what it deems suitable allowance for the future support of the wife during life, or for a shorter period, having reference to their circumstances, etc. This by way of compensation for the deprivation growing out of his own wrong. In fixing this compensation or allowance, the court may regard the earnings of the husband, or his ability to earn money: *Eidenmuller v. Eidenmuller*, 37 Cal. 364; and may subsequently reduce the amount: *Eidenmuller v. Eidenmuller*, 37 Cal. 364; or increase it: *Ex parte Cottrell*, 59 Cal. 417,—as, in its opinion, the changed circumstances of the parties shall warrant, and may enforce compliance with the order by imprisonment for contempt: *Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, 59 Cal. 417; and the husband may purge himself of contempt by showing that he is unable to obey the order, and that his inability to pay the sum directed has not been occasioned by his own act for the purpose of avoiding payment: *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167; *Ex parte Cottrell*, 59 Cal. 417; *Ex parte Wilson*, 75 Cal. 580.

The question of whether or not disobedience of the order for the payment of this allowance is contempt which may be punished by imprisonment, so ably discussed by counsel for petitioner, is no longer an open one in this state, as will be seen by the cases above cited, and perhaps others. The order for such allowance, or any subsequent order made in modification thereof, is subject to review upon appeal: *Eidenmuller v. Eidenmuller*, 37 Cal. 364; but until reversed it must be obeyed, or the party must purge himself of contempt by showing his inability to pay it, and that the inability is not occasioned by his own act for the purpose of avoiding payment.

The remaining questions presented in this case were fully considered in *Ex parte Wilson*, 75 Cal. 580, and we see no reason to depart from the conclusion there reached.

Let the writ be dismissed.

PATERSON, J., dissented from the opinion as rendered by a majority of the court, and contended that if the law existed as therein construed, then it should be repealed, or the right to an absolute divorce and the privilege of remarriage abolished, or the law should provide, as he believed under a proper construction it now provides, that only the property, separate and community, in existence at the time that the divorce is granted, can be taken for the support of the divorced wife. He contended that the law, as construed by the court, is at variance with the entire scope and spirit of the principles of law governing the subject of personal relations; and in aid of

his construction of sections 136-140 of the Civil Code of California, relating to alimony and permanent allowance to the wife in actions for divorce, he quoted section 141 of the same code, providing that "in executing the five preceding sections, the court must resort, — 1. To the community property; then, 2. To the separate property of the husband." In support of his construction, he reasoned that the law encourages the marriage of persons competent to assume that relation, and fosters its continuance. It also renders all contracts and conditions in restraint thereof void as against public policy. It makes divorce absolute, while no such thing exists as divorce from bed and board. When divorced, each party is relieved from all the obligations of the marriage bond; from that time on they are single persons, and act, as between themselves, as strangers, with no duties or obligations due from one to the other. Each is free to marry again, and the law encourages each so to do. The law, recognizing that the marriage relation may no longer exist in some cases, has prescribed six different grounds, upon any one of which, if properly shown to exist, the marriage may be dissolved. In particular cases, penalties are fixed to be imposed upon the guilty party; but they all relate to the property of the husband and wife, either separate or common. "No personal penalty is provided, such as imprisonment or forfeiture of a limitation upon the privilege of remarriage. Under these provisions, a divorced man marries a second or third time. The divorced wife does the same thing. The man, upon whom devolves the duty of supporting his family, is dependent upon his daily earnings to perform this duty. The woman, who has, by the decree of divorce, been released from all duties toward him, demands that his earnings, or a portion of them, shall be devoted to her support, and his lawful wife and their children must take what is left. If he refuse to take the bread from them and give it to her, who owes him no duty, he may be thrown into jail, and be thus deprived of the power to support any of them. Such law as this — a law which permits or encourages a man to assume the responsibilities of husband and father, and imposes at the same time such inconsistent conditions, and such unequal and inequitable burdens — ought not to blister the pages of our statute books." In conclusion, the judge said: "It is an anomalous condition of domestic affairs which requires a man, who has been permitted and encouraged to assume new marital duties and obligations, to support a legal relit, who is not only matrimonially dead to him, but is perhaps married to another, who is unable or unwilling to support her."

DIVORCE AND ALIMONY. — For definitions of alimony, see note to *Methvin v. Methvin*, 60 Am. Dec. 665, 666; note to *Buckminster v. Buckminster*, 38 Am. Dec. 659.

As to the nature of permanent alimony, when it may be allowed by the court, and how it is distinguished from temporary alimony, see note to *Methvin v. Methvin*, 60 Am. Dec. 667-673. Ordinarily, there can be no allowance of permanent alimony, where a decree of divorce is denied: *Peyre v. Peyre*, 79 Cal. 336; but there may exist circumstances under which the court may allow alimony without a divorce: Note to *Methvin v. Methvin*, 60 Am. Dec. 666, 667; *Gilpin v. Gilpin*, 12 Col. 505; *Graves v. Graves*, 36 Iowa, 310; 14 Am. Rep. 525. Under the Civil Code, it is in the court's discretion to allow permanent alimony either in a gross sum or in periodical payments: *Robinson v. Robinson*, 79 Cal. 511; but the amount of the alimony having been agreed upon and fixed at a gross sum, the wife cannot maintain another action for additional alimony, at least not without showing a change in the circumstances of the parties: *White v. White*, 75 Iowa, 218; *Reid v. Reid*, 74 Iowa, 681. In the absence of an abuse of discretion, the allowance of alimony made

by the court will not be reviewed or interfered with on appeal: *White v. White*, 73 Cal. 105; *Blair v. Blair*, 74 Iowa, 311; *Peck v. Peck*, 113 Ind. 163.

Failing to pay temporary alimony is not contempt of court: *Allen v. Allen*, 72 Iowa, 502; but *contra*, see *In Matter of Fanning*, 40 Minn. 4. But when a husband fails to comply with a final decree or order against him for alimony, the court may imprison him until he obeys the order or satisfies the decree, for he is in such a case guilty of contempt: *Lewis v. Lewis*, 80 Ga. 706; 12 Am. St. Rep. 231; *Spencer v. Lawler*, 79 Cal. 215; unless he is actually unable pecuniarily to pay the money: *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167; but a husband who has been committed for contempt for not paying alimony cannot be discharged upon *habeas corpus* upon showing that since imprisonment he has become insolvent: *Ex parte Wilson*, 73 Cal. 97.

[IN BANK.]

STONE v. HAMMELL.

[83 CALIFORNIA, 547.]

SURETYSHIP—REIMBURSEMENT OF SURETY.—As a general rule, a surety can recover of the principal only the amount which he has actually paid.

SURETYSHIP—NOTE OF SURETY AS EXTINGUISHMENT OF DEBT.—A surety, by giving his negotiable note for the debt due by his principal, can only recover the amount thereof from the latter when such note extinguishes the debt of the principal to his creditor.

SURETYSHIP—CO-SURETIES—RIGHT TO RECOVER CONTRIBUTION ON OUTLAWED DEBT.—A co-surety who has contributed his share of the principal's debt to a co-surety, who has satisfied the whole debt, cannot recover the amount so paid in contribution of their principal, when the liability of the latter has been extinguished by the statute of limitations before any payment by either of the sureties.

SURETYSHIP—CO-SURETY—STATUTE OF LIMITATIONS AGAINST.—The liability of a surety for contribution to his co-surety, who has paid the principal debt, is kept alive by the absence of the former from the state; but such absence does not extend the time within which he may recover of his principal the amount so contributed. His right to recover of the principal in such case is barred in two years from the date of payment of the principal debt, unless the obligation is founded upon an instrument in writing.

STATUTE OF LIMITATIONS—ABSENCE FROM STATE, EFFECT OF.—Absence of a party from the state stops the running of the statute of limitations as to causes of action against him; but his absence does not stop the running of the statute as to any cause of action in his favor.

S. W. Bouton, and Wells, Guthrie, and Lee, for the appellant.

B. F. Thomas, for the respondent.

McFARLAND, J. After further consideration upon argument on rehearing, we are satisfied that the judgment in this case should be reversed.

The plaintiff and three other persons—Newell, Hamilton,

and Hayman—were sureties on a promissory note made by defendant, Hammell, to one Byron Stevens for three thousand dollars, dated July 1, 1877, and payable one year after date. Plaintiff claims that one of said sureties, Newell, paid on said note something over two thousand dollars, and that plaintiff paid to Newell, as his *pro rata* contributive share, one thousand dollars; and this action was brought to recover said one thousand dollars of defendant, the principal on the note.

There are a number of interesting questions in the case, which, under the views which we take of it, need not be determined. For instance, defendant contends that he gave a mortgage to the sureties to secure them, and that the mortgage should have been foreclosed, and that the mortgaged property was sufficient in value to satisfy the note; that defendant was discharged from the liability sued on by a decree in insolvency; and that the one thousand dollars was more than plaintiff's contributive share. We will assume, however, that the property was not held by way of mortgage, and was faithfully applied by Newell, as far as it would go, to the payment of the note; that the decree in insolvency did not include the liability sued on; and that one thousand dollars was the correct amount of plaintiff's contributive share.

It is not averred in the complaint or found by the court that the plaintiff, Stone, ever paid to his co-surety Newell any money or gave him any property in satisfaction of Newell's claim for contribution. The only averment on the subject is as follows: "That on the 1st of March, 1884, this plaintiff, in full satisfaction of the amount of money which he should contribute to said P. N. Newell for his aforesaid payments on the aforesaid note, made, executed, and delivered to said P. N. Newell his promissory notes in the sum of one thousand dollars, whereupon the said P. N. Newell gave to plaintiff his receipt in full for plaintiff's liability to contribute to him for the aforesaid payments on said promissory note." This is not a very clear averment that Newell took the notes in absolute payment of his former claim; but we will assume it to be sufficient for that purpose. There is no averment that plaintiff ever paid the notes, or any part of either of them. It appears, from the findings, that they were payable two years after date, and would not mature until more than a year after this action was commenced. The court below held that the giving of these notes, and their acceptance as payment by Newell, constitutes a cause of action in favor of plaintiff against de-

fendant. In this holding, under the facts in the case at bar, at least, the court, in our opinion, erred.

The general rule is, undoubtedly, that a surety can recover of the principal only the amount or value which the surety has actually paid. If he has paid in depreciated bank notes taken at par, he can recover only the actual value of the bank notes so paid and received; if he has paid in property, he can recover only the value of the property; if he has compromised, he can recover only what the compromise cost him. The rule is, that he shall not be allowed to "speculate out of his principal": Brandt on Suretyship and Guaranty, sec. 182, and cases there cited; *Estate of Hill*, 67 Cal. 243.

There is authority, however, and perhaps a preponderance of authority, to the point that if a surety, by giving his negotiable promissory note, satisfies the claim of the creditor, and extinguishes the debt of the principal to the creditor, he may recover from the principal the amount of the debt, without showing that he has paid his promissory note: Brandt on Suretyship and Guaranty, sec. 181, and cases cited. But the authorities are not uniform upon the subject. In Indiana and North Carolina, and some other states, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient: *Brisendine v. Martin*, 1 Ired. 286; *Nowland v. Martin*, 1 Ired. 307; *Romine v. Romine*, 59 Ind. 351, and cases there cited. Many of the cases hold that if the surety discharges the debt by a negotiable note he can maintain an action against the principal, while if he does so by means of a bond or any non-negotiable instrument, he cannot, upon the theory that a negotiable note is analogous to money, — a distinction which is founded upon no apparent good reason: *Boulware v. Robinson*, 8 Tex. 327; 58 Am. Dec. 117; *Peters v. Barnhill*, 1 Hill (S. C.) 237. The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money; its weakness lies in the possibility of the surety recovering the whole amount of the principal, and never paying his own note, thus violating the cardinal rule that the surety shall not speculate out of the principal. But if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it; and in all cases to which our attention has been called, the rule has been enforced

against the principal in favor only of the surety who has extinguished the debt to the original creditor.

We have seen no case in which the rule has been applied to a surety who had not satisfied the original debt, but had only given his note to another surety who had satisfied it. Moreover, the reason of the rule — if it be held to be the rule — is, that the principal is benefited to the extent of the original debt or liability which has been extinguished by the new obligation of the surety; and the reason ceases when there is no such benefit. Now, in the case at bar, defendant was in no manner benefited by the notes given by plaintiff to Newell, nor was any debt or liability of defendant thereby extinguished; because at the time the notes were given there was no legal liability from the defendant to Newell, for the reason that any cause of action which the latter might have had against the defendant for moneys which he had paid to Byron Stevens had long been barred by the statute of limitations. The last payment made by Newell on the note to Stevens, as averred and found, was on January 10, 1881; and as his cause of action for the payments which he had made was not “founded on a written instrument,” it was barred in two years, — that is, on January 10, 1883: *Chipman v. Morrill*, 20 Cal. 136. But plaintiff did not give his notes to Newell until March 1, 1884. At that time defendant was under no legal obligation to any one which plaintiff could discharge by giving said notes. The original note given to Stevens had itself been long since outlawed. Therefore, by giving said notes plaintiff acquired no cause of action against the defendant herein.

We think, also, that the cause of action averred in the complaint would have been barred by the statute of limitations, which was pleaded by defendant, even though plaintiff, on March 1, 1884, had actually paid Newell the one thousand dollars in money. Plaintiff seeks to avoid the running of the statute through the fact that within a month after the original note to Stevens matured he left the state, and resided out of the state for several years. His contention is, that as Newell's cause of action against him for contribution would not be barred while he remained out of the state, therefore his cause of action which he had against defendant, or which he proposed at some future time to have by paying his contributive share to Newell, would not be barred during his absence from the state, though such absence should be for fifty years. He con-

tends that by returning at any time, and subjecting himself to Newell's claim and paying it, he could recover his part of it against defendant, although in the hands of Newell it had been outlawed for a quarter of a century. We do not think that the law of limitation of actions contemplates any such an anomaly. When a man leaves the state, the statute of limitations does not run during his absence as to any cause of action against him; but his absence does not prevent the statute from running as to any cause of action in his favor. At any time within two years after Newell had paid the original note, plaintiff could have paid his contributive share to Newell and maintained an action for it against defendant. But he could not wait until the whole of Newell's cause of action against defendant was barred, and then revive one half of the claim by coming back years afterward and making a real or pretended payment of it to Newell. The whole claim was, as to defendant, dead; and the breath of life could not be blown into one half of it by any such legal hocus-pocus.

For the reasons above stated, the judgment and order appealed from are reversed, and the cause remanded for such further proceedings as respondent may be advised to take.

BEATTY, C. J. (concurring). I concur. A surety who pays the debt of his principal has an undoubted right to recover the amount paid. But such is not the case here. The liability of the principal had been extinguished by the statute of limitations before any payment by the surety. The absence of the plaintiff from the state had kept the claim alive as to him, though it was extinguished as to the defendant. The plaintiff, therefore, did not pay the defendant's debt, — he merely paid his own debt. By so doing, he could not possibly acquire a right of action against the defendant.

SURETYSHIP. — Right of one surety to enforce contribution from another, and the remedies for its enforcement: See extended note to *Gross v. Davis*, 10 Am. St. Rep. 639-647, wherein is discussed the payment by a surety of a debt outlawed. One surety paying only his proportion of the secured debt can have no right to contribution from his co-surety: *Pegram v. Riley*, 88 Ala. 399.

SURETY'S CLAIM UPON PRINCIPAL. — Where a stranger pays the principal's debt, and is reimbursed by the surety, the surety may recover the amount of his payment from the principal: *Harper v. McVeigh*, 82 Va. 751. A surety's right of action arises for reimbursement from principal immediately upon his actual payment of the obligation: *Harper v. McVeigh*, 82 Va. 751. In *Harrah v. Jacobs*, 75 Iowa, 72, it is decided that a joint maker of a promissory note, who is really but a surety, and who pays the note, cannot sue the principal for indemnity after the lapse of five years from the date of the payment of the note by him.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

KING v. GOODWIN.

[180 ILLINOIS, 102.]

LIEN OF CREDITOR'S BILL. — The filing of a creditor's bill and the service of process thereon create a lien on the equitable assets of the judgment debtor, without the issuance of an injunction or the appointment of a receiver, and no voluntary assignment by the debtor, nor intervening claims of other creditors, can impair the lien thus created.

LIEN OF CREDITOR'S BILL. — The lien upon equitable assets acquired by a creditor's bill is not extinguished by the death of the debtor before the appointment of a receiver, but survives against such assets in the hands of the administrator.

LIEN OF CREDITOR'S BILL SUPERIOR TO WIDOW'S AWARD. — The widow's claim to her award is against the estate of her deceased husband; and if there is no estate, she has nothing to rely upon for the payment of the award. If the estate is encumbered by a valid lien, created by a creditor's bill, the award does not set aside the lien, and she has only a claim on so much as may be left after satisfying the lien.

RECEIVER IS QUASI TRUSTEE, holding the fund for the benefit of whoever may eventually establish title thereto.

CREDITOR'S BILL — PARTIES. — Question of necessity of the receiver being a party to a creditor's bill should be raised by demurrer.

C. H. and C. B. Wood, and S. B. King, for the appellant.

S. K. Dow, for the appellee.

By COURT. — Having duly considered both the oral and printed arguments submitted in this case, and examined the authorities cited in the briefs of counsel, we concur in the conclusion reached by the appellate court, the reasons for which are satisfactorily stated in the following opinion by Garnett, P. J., of that court: —

"This is a creditor's bill, filed June 16, 1883, by appellant, against Claude B. King, Anna King, his wife, and Homer N. Hibbard, receiver of the Montello Granite Company, based on a judgment recovered at the April term, 1883, of the superior court of Cook County, in favor of appellant and against said Claude B. King, for \$1,076, and costs. Execution was issued and duly returned unsatisfied.

"The Montello Granite Company was the style of a copartnership composed of Claude B. King and James H. Anderson. In a suit to wind up the affairs of that firm, the superior court, on the eighteenth day of October, 1882, appointed H. N. Hibbard receiver of the firm's assets. At the time the bill in this case was filed, the receiver was proceeding with the duties of his office, and was in possession of the partnership effects. The purpose of the creditor's bill was to reach King's interest in the firm's assets, whatever it might appear to be on final adjustment, and other equitable assets, for the payment of said judgment. The receiver was made a defendant to the creditor's bill without leave of the superior court. He demurred to the bill, and his demurrer was sustained October 18, 1883. King and wife answered, admitting the copartnership, and stating, among other things, that Claude B. King had no property, or interest in any, except his interest as copartner in the assets of the Montello Granite Company in the hands of said receiver. Replication to the answer was filed October 25, 1883. On November 11, 1884, Claude B. King died, leaving his wife surviving. His death was suggested of record May 25, 1885. His wife, having been appointed administratrix of his estate by the probate court of Cook County, filed her answer, as administratrix, on July 8, 1885, stating the death of her husband; her appointment and qualification as administratrix; that the deceased left no estate except that involved in the litigation with his partner, Anderson; that all of said property is in the custody of the law, in the hands of a receiver; that it was probable that said estate will be insolvent, and that there would not be more property than enough to pay preferred claims.

"By her supplemental answer, filed March 12, 1888, she states that the whole personal estate of said Claude B. King had been appraised, and the appraisal approved by the probate court of Cook County, at \$277; that the estate is insolvent; that her widow's award had been fixed at \$1,975, which she claims should be allowed to her out of any funds in the

receiver's hands coming to the estate, in preference to the claim of appellant. On the 6th of November, 1885, the receiver was made a party defendant to the bill by leave of the court, and filed his answer November 17, 1885, alleging, in substance, that he was unable to determine the amount of King's interest in the assets of the Montello Granite Company. Replications were filed to the answers. It appeared, on the hearing, that the amount in the receiver's hands coming to King's estate is something over \$1,500, and that the widow's award had been fixed at \$1,975. The court below dismissed the bill for want of equity.

"The general rule is, that the filing of a creditor's bill, and service of process, creates a lien on the equitable assets of the judgment debtor. It has been aptly termed an 'equitable levy': *Wait on Fraudulent Conveyances*, sec. 68; 2 *Wait's Actions and Defenses*, 428; *First Nat. Bank v. Gage*, 93 Ill. 172; *Lynch v. Johnson*, 48 N. Y. 27; *Miller v. Sherry*, 2 Wall. 237; *Adsit v. Butler*, 87 N. Y. 585.

"In the case at bar, no injunction was issued or receiver appointed. Was either necessary to make the 'equitable levy' perfect? In *Storm v. Waddell*, 2 Sand. Ch. 494, the court (p. 582) emphasizes the point that 'the lien was acquired by the commencement of the suit, and not by the order for a receiver, or his appointment.' And on pages 584 and 585, it is said: 'Without regard to the injunction, the property of the defendant is subjected to the suit, wherever it may be, if the receiver can lay hold of it, or the complainant can reach it by the decree. . . . A receiver is a convenient but not indispensable part of the proceeding. No voluntary assignment of the debtor can impair the complainant's right, nor any intervening claim of other creditors. I speak, in this outline, of equitable interests and things in action.'

"In *Roberts v. Albany etc. R. R. Co.*, 25 Barb. 662, the court said: 'As soon as the judgment creditor's suit was instituted, the plaintiffs in that suit obtained a lien on all the choses in action of Rutter. All the title he had was subject to that lien; all that he could pass was subject to it. When the receiver was appointed (whether Rutter assigned to him or not), he acquired the title to those choses in action which Rutter had when the action was commenced. In contemplation of law, the title vested in the court when the action was commenced, and passed, as from that date, to the receiver.'

"In *Brown v. Nichols*, 42 N. Y. 26, it was held that the lien

upon equitable assets acquired by the commencement of an action in the nature of a creditor's bill is not extinguished by the death of defendant before the appointment of a receiver, but survives against such assets in the hands of the administrator.

"The supreme court of this state, in *First Nat. Bank v. Gage*, 93 Ill. 172, cites the cases of *Storm v. Waddell*, 2 Sand. Ch. 494, and *Brown v. Nichols*, 42 N. Y. 26, with approval, and states the law to be, that the filing of a creditor's bill, or at least the service of process, gives the complainant a lien upon the property of the judgment debtor, by placing it under the control of the court, which will not suffer it to be withdrawn, so as to defeat the object of the bill by any subsequent act or title. 'As respects equitable interests and things in action, the rule appears to be, that the lien is fixed by the commencement of the suit.' (Page 175.)

"Admitting that the receiver must be considered as no party to the suit at or before the death of King, still the situation is not changed. King had an equitable interest in the fund sought to be reached, and as he was a party to the suit, the lien survived his death, and holds good against all claiming under him. A decree against him would have been valid against his administratrix, although the receiver was not a party: *Bennitt v. Wilmington Star Mining Co.* 119 Ill. 9.

"That the interest of King in the firm assets was uncertain at the time the creditor's bill was filed is no barrier to complainant's suit; otherwise any undivided equitable interest whose amount or value cannot be ascertained except upon an accounting or reduction of the fund to money is secure against the attack of creditors.

"The widow's claim to her award is against the estate of her deceased husband: R. S., secs. 70, 75, c. 3. If there is no estate, she has nothing to rely on for the payment of the award. If the estate is encumbered by a valid lien, the award does not set aside the lien. She only has a claim on so much as may be left after satisfying the lien. In this case there is no estate to pay the widow's award until the lien acquired by the creditor's bill is discharged. The receiver is a *quasi* trustee, holding the fund for the benefit of whoever may eventually establish title thereto: *High on Receivers*, sec. 1.

"If, therefore, a creditor's bill can only be maintained in cases of fraud and trust, as contended by appellee, the facts of this case are such that the jurisdiction attaches. The ques-

tion of superior diligence only arises between creditors contending for priority of lien, and has no application here. The publicity with which a debtor's estate is surrounded by a trust which defies all the assaults of the ordinary process of law cannot be relied on as a protection against the equitable remedy of a creditor's bill.

"The decree of the superior court is reversed, and the cause remanded, with directions to enter a decree in conformity with this opinion."

If the defendants Claude B. and Anna King, or Anna King as administratrix, desired to raise the question as to the receiver being a necessary party to the bill, they should have done so by demurrer: *Wait on Fraudulent Conveyances and Creditors' Bills*, sec. 133, and cases cited.

The judgment of the appellate court is affirmed.

CREDITOR'S BILL. — Parties to the bill, property subject to the bill, and the effect of the bill as a lien: See extended note to *Massey v. Gorton*, 90 Am. Dec. 238-300.

CREDITOR'S BILL — PARTIES. — The real representatives of a decedent are necessary parties to a creditor's bill, against the personal representative, seeking to subject decedent's realty to the satisfaction of debts proved: *Perkins v. Berry*, 103 N. C. 131.

TO MAINTAIN A CREDITOR'S BILL, a creditor must, ordinarily, show that he has exhausted his remedy at law, or that no adequate remedy at law exists: *Humphreys v. Atlantic etc. Co.*, 98 Mo. 542; *Vanderpool v. Notley*, 71 Mich. 422; *Durand v. Gray*, 129 Ill. 10; *Ahlhauser v. Doud*, 74 Wis. 400; *Schuster v. Rader*, 13 Col. 329.

ANTHONY v. WHEELER.

[180 ILLINOIS, 123.]

FRACTION — DIRECTING VERDICT. — The jury may be instructed to find for defendant when plaintiff has wholly failed to prove some material part of his case, and the same rule applies to plaintiff under similar circumstances on the part of defendant. Such an instruction can only be questioned when there was competent evidence tending to support a different verdict from the one directed by the court.

DEEDS — NECESSITY FOR RECORDING — WHEN TAKE EFFECT. — All deeds or other instruments relating to or affecting the title to real property take effect only from and after recording, as to all subsequent purchasers without notice, under the Illinois statute.

UNRECORDED DEEDS — CONSTRUCTIVE NOTICE TO SUBSEQUENT PURCHASERS. — Actual notice is not essential to give effect to a prior unrecorded conveyance. Any fact or circumstance coming to the knowledge of the subsequent purchaser which would put a prudent man on inquiry, and which, if pursued, would lead to actual notice of a prior unrecorded deed

lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase; and, in such case, notice is imputed to the subsequent purchaser on account of his negligence in not prosecuting his inquiries in the direction indicated. Enough must be shown to impute bad faith to him in order to taint his purchase with fraud in law, and mere want of caution as distinguished from fraudulent and willful blindness is not sufficient to charge him with constructive notice of the unrecorded deed.

UNRECORDED ADMINISTRATOR'S DEED, WHEN NOT NOTICE TO SUBSEQUENT PURCHASER. — An unrecorded administrator's deed, in the absence of actual notice thereof, or of the proceeding under which it was obtained, is not such constructive notice as will invalidate the title of a subsequent bona fide purchaser.

UNRECORDED ADMINISTRATOR'S DEED — DECREE AUTHORIZING, NOT NOTICE TO SUBSEQUENT PURCHASER. — A decree in a proceeding to sell land to pay debts in the county court, in the county where the lands are situated, is not constructive notice to a subsequent purchaser of the execution of an administrator's deed.

SUBSEQUENT PURCHASER IS PRESUMED to be a purchaser for value, and the burden of proof is on the party attacking the conveyance to show bad faith or want of consideration.

Sawin and Vanderplæg, and F. P. Simons, for the appellants.

William J. Ammen, and George F. Harding, for the appellee.

WILKIN, J. This is an action of ejectment, to recover parts of a city lot in Chicago. At the time suit was brought, appellants were in possession, claiming title under certain tax deeds and by virtue of a quitclaim deed from one Carrie Walker, and Samuel O. Walker, her husband, to appellant Caroline M. Robertson, dated June 9, 1885, and recorded on the 13th of the same month. Appellee, claiming to hold the paramount title, brought this suit to the June term, 1886, of the superior court of Cook County.

On the trial, testimony was introduced by both parties, which, on some of the questions involved, was conflicting. After the evidence was closed, the judge, against the objection of the defendants, instructed the jury to find for the plaintiff, and on verdict being returned, and motions for new trial and in arrest of judgment overruled, judgment was entered for the plaintiff for the premises claimed, and for costs. Defendants prayed this appeal.

Numerous errors are assigned on the record. The fourth presents the principal question in the case, viz.: "The court erred in instructing the jury to find a verdict for the plaintiff."

Although the practice of thus taking a case from the jury has been often questioned in this court, it is now so firmly

established as to no longer require the citation of authorities in its support. The question has generally arisen on instructions to find for the defendant in cases where it was thought the plaintiff had wholly failed to make proof of some material part of his case; but the practice extends to and allows a similar instruction on behalf of the plaintiff, as expressly decided in the late case of *Heinzen v. Lamb*, 117 Ill. 549,—a case similar to this. The important question in every case in which such an instruction is given is, Was there competent evidence tending to support a different verdict from the one directed by the court?—the theory upon which the practice is approved being, that whether or not there is such evidence is a question of law, to be determined by the court.

It is said by counsel for appellee that the ground upon which the instruction was given in this case was, that the plaintiff had shown, by undisputed proof, a fee-simple title from the admitted common source, and that the defendants were chargeable with constructive notice of the unrecorded deed under which he claims, and that all other evidence admitted upon either side was, in that view, incompetent or immaterial, and we are convinced that upon no other theory of the case can even a plausible argument be adduced in its support.

By reference to the bill of exceptions, we find that Martin O. Walker, the common source of title, died May 24, 1874, seised in fee of the property in question. He left two sons, Samuel O. and Edward S., his only heirs. Plaintiff below, to establish his title, offered in evidence quitclaim deeds from these heirs to one Charles Fargo, dated September 20, 1875, and recorded two days thereafter, that from Edward S. being in consideration of nine hundred dollars, and the other of one dollar and other valuable consideration; also a quitclaim deed, in consideration of one dollar, from said Fargo to Carrie Walker, who was the wife of Samuel O. Walker, dated March 23, 1877, recorded November 2, 1878; also a quitclaim deed, in consideration of one dollar, from said Carrie Walker, and Samuel O. Walker, her husband, to George F. Harding, dated July 20, 1887; also a warranty deed from said Harding and wife, to appellee, in consideration of five hundred dollars, dated May 7, 1883. Neither of these last two deeds was recorded until July 1, 1885. He also offered in evidence the record of a proceeding in the county court of Cook County, showing that in March, 1876, Augustus L. Chetlain, administrator of Martin O. Walker,

deceased, filed his petition, praying an order of said court to sell this and other real estate belonging to said deceased to pay debts; also a deed of August 30, 1878, and report of said administrator, showing a sale of the property in question to one George R. Grant on the fifteenth day of October, 1878, for one hundred dollars, which report was approved October 19, 1878. He also introduced in evidence an administrator's deed from said Chetlain, administrator, to said Grant, dated October 15, 1878, and recorded July 1, 1885, and a quitclaim deed from said Grant to George F. Harding, dated February 25, 1883, in consideration of one dollar, recorded July 1, 1885. Defendants below introduced the above-mentioned deed from Carrie Walker and her husband to Caroline M. Robertson, and also two tax deeds,—one dated March 23, 1877, recorded the 26th of that month, and another dated March 31, 1881, recorded April 5, 1881,—and from these, through mesne conveyances, the said Caroline M. Robertson, on December 17, 1884, received a deed from appellants Jennie B. Bryan and husband, which was recorded December 19, 1884. In our view of the case, it is not necessary to inquire into the validity of appellants' title through these tax deeds.

It will be seen, from the foregoing statement, that when Caroline M. Robertson received her deed from Carrie Walker, June 9, 1885, and placed it on record June 13, 1885, there was no deed of record by which her title could be questioned. All the deeds through which appellee claims, both under the administrator's sale and the deed from this same Carrie Walker, remained unrecorded until July 1, 1885. We shall also, for the purposes of this opinion, treat the proceeding of the administrator in the county court to sell land to pay debts as in all respects valid. Therefore from that source appellee established by undisputed proof a claim of title which would have vested the fee in him, as against appellants, had his deeds been recorded before the deed from Carrie Walker to Caroline M. Robertson. The question then is, Are the facts proved so conclusive of notice to appellants of the unrecorded deeds of appellee as to justify the court in withdrawing that question from the jury?

It is not claimed that there was actual notice of any of these unrecorded deeds. Our statute requires all deeds or other instruments relating to or affecting the title to real estate to be recorded, and expressly provides that they shall take effect only from and after such recording as to all sub-

sequent purchasers without notice. When we say that notice of a prior deed shall have the same effect as recording, we but repeat the language of the statute. The question, however, still remains, Who is a "subsequent purchaser without notice," within the meaning of the law?

It is well settled that actual notice is not essential to give effect to a prior unrecorded conveyance. The difficulty in such cases usually arises from the necessity of determining what shall be held sufficient constructive notice, and that is what we are called upon to do here. It is stated by the authorities generally that any fact or circumstance coming to the knowledge of the subsequent purchaser which would put a prudent man on inquiry, and which, pursued, would lead to actual notice of an unrecorded deed lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase. In such case, notice is imputed to the subsequent purchaser, on account of his negligence in not prosecuting his inquiries in the direction indicated: *Wade on Notice*, sec. 246. Enough must be shown to impute to the subsequent purchaser bad faith, so as to taint his purchase with fraud in law: *Doyle v. Teas*, 4 Scam. 202. Mere want of caution as distinguished from fraudulent and willful blindness is not sufficient to charge a subsequent purchaser with constructive notice of an unrecorded deed: *Grundies v. Reid*, 107 Ill. 304.

Here the appellee insists that appellants had constructive notice of the unrecorded administrator's deed within the rule above stated. The position sought to be maintained is, that the proceedings in the county court were sufficient to put her on inquiry, which, properly pursued, would have led to knowledge of the administrator's deed. There is no proof whatever that she had actual knowledge of that proceeding. An attempt was made to show that such knowledge was brought home to her husband, who seems to be the real party in interest, through an abstract of the title; but this he denies, and we think the weight of the evidence is, that he had no such actual notice,—at least it cannot be claimed that there is not a fair conflict of evidence on that point, even as to him. In fact, the argument of counsel for appellee is not based on the theory of actual notice of that proceeding, but they maintain that, inasmuch as the proceeding was had in the county court of the county in which the land is located, appellants were bound to know what had been done in that court, and from that knowledge pursue the inquiry as to whether or not a deed

had been made. The logical result of the position is, that the registry law of this state has no application to administrator's deeds, when the proceeding under which the sale is made is had in the county where the land is located.

In *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460,—cited by counsel for appellee as sustaining their position,—one of the questions raised was, whether or not an unrecorded administrator's deed, made in pursuance of a decree rendered in a county other than that in which the land was situated, was constructive notice to subsequent purchasers. Treat, C. J., rendering the opinion of the court, after quoting the recording act of the 18th of January, 1853, says: "Administrators' deeds would seem to be clearly within the letter of this statute. They are clearly within the reason and spirit of its provisions." It is true, he says: "In the county where the order of sale is made, there would not seem to be the same necessity for the deed to be registered, and the record of the proceedings might perhaps then be held to be notice to a purchaser. Upon this point, however, we must be understood as expressing no opinion." Here it is expressly decided that administrators' deeds are within both the letter and spirit of the recording act. The position contended for by appellee is not only not decided, but an express declination on the part of the court to decide it.

In *Bourland v. County of Peoria*, 16 Ill. 538, the question arose as to whether or not the record of the county commissioner's court showing a sale of real estate should be held constructive notice of such sale as to subsequent purchasers. It was there insisted that, the commissioners being required by law to keep, and having made and kept, a record showing the sale, it was notice of what it contained in relation to the title of the county to all subsequent purchasers. It was held that the position was not tenable, Scates, J., saying: "The recording acts, for the purposes of information and constructive notice, have not altered or abolished the rules of equity in relation to actual and constructive notice by other means than the recording act: *Guard v. Rowan*, 2 Scam. 501; *Doe ex dem. v. Reed*, 4 Scam. 117. But while all this is true, it is also true that the legislature, and not the court, must add and declare the existence and effect of other records as constructive notice of title and encumbrance. Such effect is given to judgments by declaring a lien upon the lands in the county, without declaring the existence of such judgments to be constructive notice. But it must have such effect as notice in order to give

it effect as a lien, and we must, consequently, so treat and hold it. Such, too, is the effect of the levy of an attachment when followed by a judgment. So, too, I presume, would be the levy of a *fiery facias* from another county when levied before the statute which required the filing of such levy with the circuit clerk and the recorder, and declared its effect as notice to be from such filing. These orders of the county court (and, we may admit, this sale-book) were records; but, still, every matter of record is not constructive notice of the subject-matter of it to all strangers. No such effect has been given to these records by the recording or other laws of the state, nor can such effect be claimed for them by reason of their affecting the land, like judgments and such mesne and final process referred to. In tracing title to or through the county, as through or from any other vendors, we should go to the recorder's books, and to the judicial records and levies, where evidences of conveyances, contracts, encumbrances, and liens are kept and to be found." This language and reasoning are equally applicable to a proceeding in the county court by an administrator for a decree to sell land to pay debts.

Stokes v. Riley, 121 Ill. 166, does not militate against this position. There was actual notice of the judgment. Besides, the statute made the judgment in that case a lien, and the subsequent purchaser was bound to take notice, as is held in *Bourland v. County of Peoria*, 16 Ill. 538.

An unrecorded administrator's deed, in the absence of actual notice of it, or the proceeding under which it was obtained, is not such constructive notice as will invalidate the title of a subsequent *bona fide* purchaser.

The contention that appellant is not, within the meaning of the law, a *bona fide* purchaser, is without force. We find no evidence in the record on which to base it. The only fact suggested is inadequacy of consideration named in her deed. When we consider that the deeds through which appellee claims are all upon mere nominal considerations, it can scarcely be presumed that this property was of such great value in the market as to make the consideration named in appellants' deed evidence of bad faith on her part. The presumption is, that she is a *bona fide* purchaser, and the burden of proof to show bad faith or want of consideration is upon appellee: *Ryder v. Rush*, 102 Ill. 338. That, at least, was a question for the jury.

The fourth assignment of error is well made, and the judgment below must be reversed.

PRESUMPTION THAT SUBSEQUENT PURCHASER IS PURCHASER BONA FIDE. — On the question involved in the principal case, as to whether or not a subsequent purchaser under a deed is presumed to be a *bona fide* purchaser for value without notice, the authorities are somewhat conflicting. The great weight of authority, however, clearly establishes the doctrine that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith without notice of prior unrecorded deeds, until the contrary is shown; and that the burden of proof to show notice and want of good faith is on the party attacking the deed: *Roll v. Rea*, 50 N. J. L. 264; *Holmes v. Stout*, 10 N. J. Eq. 419; *Coleman v. Barkley*, 27 N. J. L. 357; *Lacustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 476; *Wood v. Chapin*, 13 N. Y. 509; 67 Am. Dec. 62, note 73; *Ryder v. Rush*, 102 Ill. 338. In *Vest v. Michie*, 31 Gratt. 149, 31 Am. Rep. 722, it is decided that, to affect a purchaser for value with notice of an unrecorded deed of trust, the evidence must be sufficient to prove him guilty of fraud. In discussing the question, the court remarks: "Whilst it is held that the fact of notice may be inferred from circumstances, as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides*. . . . The effect of the notice which will charge a subsequent purchaser for a valuable consideration, and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is therefore never to be presumed, but must be proved, and proved clearly; a mere suspicion of notice, even though it be a strong suspicion, will not suffice. . . . I am of opinion, therefore, that the proof which is necessary to establish the fact of notice to the subsequent purchaser, all the authorities agree, must be so strong and clear as to affect his conscience, and to justify the imputation to him of *mala fides*." In this case, the purchaser was a witness to an unrecorded deed of trust, and afterwards bought the land from the grantor in such deed, and paid him the purchase-money. In *Hiller v. Jones*, 66 Miss. 636, the court, after an exhaustive discussion of the question, determined that, in a conveyance of land duly recorded, the recital of the payment of the consideration is to be taken as *prima facie* true; and the deed itself is competent evidence of such payment. A purchaser from the vendee may rely upon the recital, and it devolves upon one who questions his title to show that he had notice of facts inconsistent with the recitals in the recorded deed. The plaintiff in this action sought to recover a parcel of land by virtue of an unrecorded deed, followed by possession. This deed was from the same grantor, under and through whom subsequent purchasers, with deeds duly recorded, and reciting a valuable consideration, claimed title. There was no evidence that the defendants, or their grantors, had any notice of such unrecorded deed; nor was there any evidence of the payment of a valuable consideration by them, other than the recitals in the recorded deeds. The court said: "Thus the question is presented, Did it devolve on the defendants to show by evidence, other than the deeds under which they held, payment of a valuable consideration by them, or by some one in the chain (of title), in order to clothe themselves with the character of purchasers for value? or could they rely on their chain of title, apparently perfect, until doubt about it was

created by some evidence? In other words, may purchasers rely on the muniments of title spread upon the records designated by law as the repository of the history of titles to land, as being truthful memorials of the consideration expressed in them, until something is shown inconsistent with what they state? . . . It is certainly true that the rule that requires the holder of a legal title, shown by successive conveyances, to support his title by proof, in the first instance, of actual payment of the consideration stated in the deeds to have been paid, would, in many instances, impose burdens hard to bear, and be productive of much mischief, and of no good, as far as we can see. . . . Any other view treats the deed as *prima facie* fraudulent, whereas, on general principles, a deed is *prima facie* valid, and its recitals true, and it requires no evidence to support it until it is attacked for fraud, not by merely alleging that it is fraudulent, or without consideration, but by showing it. . . . Were there no decisions here or elsewhere on the question, we would not hesitate to declare that, in our view of our system of recording titles to land, a conveyance acknowledging payment of the purchase-money is *prima facie* evidence that the grantee was a purchaser in good faith for a valuable consideration." In *Marshall v. Dunham*, 66 Me. 539, each party claimed under separate deeds from the same grantor, and plaintiff's deed, though earlier in date, was not recorded until after defendant's deed had been placed upon record, and the court decided that it was incumbent upon plaintiff, if he would postpone the defendant's deed to his own, to show, by a preponderance of evidence, that the defendant had actual notice of the existence of the prior deed when he received his. In such case, it is said that a strong suspicion is not sufficient, but the evidence must be clear and undoubted, to charge the purchaser with notice of title in a third person: *Foust v. Moorman*, 2 Ind. 17; *Rogers v. Wilby*, 14 Ill. 65; 56 Am. Dec. 491; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169.

The taking of a deed with knowledge of a prior unrecorded conveyance to another party is a fraud upon him. This fraud will not be presumed, but must be shown by the party seeking to avail himself of it: *Bush v. Golden*, 17 Conn. 594. If the prior grantee, under the unrecorded deed, would maintain his title against a subsequent grantee who has first recorded his deed, the burden of proof is on him to show that the subsequent purchaser had notice of the unrecorded deed: *Butler v. Stevens*, 26 Me. 484. When the declarations of the subsequent purchaser indicate his disbelief that any prior deed has been given by his grantor, although admitting his knowledge of a claim that such deed existed, by those who professed to hold under it, there can arise no presumption that he had actual notice of the existence of such unrecorded deed, nor can his conduct be considered fraudulent in taking a conveyance to himself: *Spofford v. Weston*, 29 Me. 140. For notice of prior equities by such purchaser, unless admitted by the answer, though not positively denied, must be proved: *McGahee v. Sneed*, 1 Dev. & B. Eq. 333. If a purchaser for value it to be affected by a trust, evidence of notice of the trust must first be given; and to bind such purchaser, such notice, in fact or in law, must be clearly shown: *Wilkins v. Anderson*, 11 Pa. St. 399. Evidence of open occupation, possession, and cultivation of land, and fencing it, by a party who has an unrecorded deed thereof, is not sufficient to warrant the inference that a third person had actual notice of such deed: *Pomroy Stevens*, 11 Met. 244. It may be, as in this case determined, that the possession of land by one having a right to such possession under an unrecorded conveyance is not actual notice thereof. It does, however, unquestionably operate as constructive notice. One about to purchase or to otherwise inter-

est himself in land in the open, visible possession of another must, if he wishes to acquire the rights of an innocent purchaser, inquire of such possessor by what right he holds such possession; and failing to do so, he is charged with constructive notice of whatever such inquiry, had it been prosecuted, might have disclosed to him; and therefore, if the possession was held under an unrecorded deed, constructive notice of such deed will be imputed to a purchaser or encumbrancer, unless he made proper inquiries, without such inquiries resulting in giving him notice of such deed: *Smith v. Yule*, 31 Cal. 180; 89 Am. Dec. 167; note to *Beattie v. Butler*, 64 Am. Dec. 241; *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169; *Moore v. Pierson*, 6 Iowa, 279; 71 Am. Dec. 408.

In Texas, the doctrine prevails that a party who desires the benefits accorded to innocent purchasers must show, — 1. That he was a *bona fide* purchaser; 2. That he purchased without notice, actual or constructive; 3. That he paid the purchase-money; and this he must show independent of any recital in the deed: *Watkins v. Edwards*, 23 Tex. 447; *Hamman v. Keigwin*, 39 Tex. 34; *Moore v. Curry*, 36 Tex. 668. So in Missouri, the court has decided that, to entitle a person to invoke the aid of the rule that protects a *bona fide* purchaser as against a prior unrecorded deed, he must make it appear that he made his purchase and paid the purchase-money before he had notice of such prior equity: *Wallace v. Wilson*, 30 Mo. 335. And again, in *Spicer v. Waters*, 65 Barb. 227, it is said that, to constitute a *bona fide* purchaser, it is not enough for him to show a conveyance good in form, and that payment has been secured, but he must also show that the consideration has actually been paid, and has passed between the parties. This, however, seems to be in direct conflict with what is said in *Lacustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 476, referred to above, and where the rule is promulgated that a deed acknowledging the payment of the purchase-money is *prima facie* evidence that the grantee was a purchaser in good faith for a valuable consideration within the recording act. The rule was laid down in an early case in California, and has since been adhered to, that a subsequent purchaser who seeks to avoid a prior deed of the same premises made by his grantor on the ground that he is a purchaser in good faith, and without notice, must show affirmatively that he paid a good and valuable consideration, and an acknowledgment of the payment of the purchase-money in the subsequent deed is no evidence of such payment as against the prior purchaser: *Colton v. Seavey*, 22 Cal. 496; *Galland v. Jackson*, 26 Cal. 79; *Landers v. Bolton*, 26 Cal. 393; *Root v. Bryant*, 57 Cal. 48. This rule is affirmed and followed in *Sullyman v. King*, 36 Iowa, 207; and the same doctrine prevails in Alabama: *Nolen v. Heirs of Gwyn*, 16 Ala. 725. In Ohio, the court sought, and found, a middle ground between the conflicting authorities by adopting the rule that the burden of proof as to the payment of a valuable consideration rests upon the subsequent purchaser, and, after he has adduced such proof, the burden of proving his bad faith, and his knowledge at the time of his purchase, of the existence of the former unrecorded deed from the same grantor, rests upon the holder of the prior deed: *Morris v. Daniels*, 35 Ohio St. 466.

BEACH v. MILLER.

[120 ILLINOIS, 182.]

CORPORATIONS — PROOF OF FRAUDULENT SALE BY. — Where the good faith of a sale by a corporation to one of its directors is attacked, evidence of the insolvency of the corporation at the time that the sale was made is admissible.

SOLVENT CORPORATION — DIRECTOR MAY CONTRACT WITH. — A director of a solvent corporation may, with the knowledge of the stockholders, deal with the corporation, loan it money, take security, or buy property of it in like manner as a stranger.

INSOLVENT CORPORATIONS — DIRECTORS CANNOT CONTRACT WITH. — The assets of an insolvent corporation are regarded as a trust fund for the payment of all its creditors; the directors occupy the position of trustees of such fund, and may be prohibited from purchasing the trust property, and thus securing a preference over other creditors.

INSOLVENT CORPORATIONS — RIGHTS OF CREDITORS. — The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of the other creditors.

INSOLVENT CORPORATION — PURCHASE BY DIRECTOR — RIGHTS OF CREDITORS. — A director of an insolvent corporation cannot lawfully purchase its property in satisfaction of his own debt, to the exclusion of other creditors, with whom he is only entitled to share equally, but he takes the property charged with the trust in favor of the other creditors, which may be enforced in equity, but it is not subject to the execution of another judgment creditor.

CORPORATION — SALE TO DIRECTOR — RATIFICATION. — A sale of corporate property, made by a corporation to a director, in payment of its notes held by him, though irregular because made without an order from the board of directors, is subject to ratification, and the fact that the corporation took up the notes canceled and retained them in its possession will be regarded as a ratification of the sale.

Weigley, Bulkley, and Gray, for the appellants.

Bennett and Green, for the appellees.

CRAIG, J. This was an action of trespass, brought by Joseph T. Miller, in the circuit court of Whiteside County, against Thomas S. Beach and George C. Keefer. The declaration contained four counts. In the first and second it is alleged that defendants, with force and arms, broke and entered two certain rooms in a certain warehouse, known as the warehouse of the Rock River Packing Company, which said rooms were then and there in the possession of the plaintiff. The third and fourth counts are trespass *de bonis asportatis*, for taking and carrying away 94,612 tomato-cans, 3,516 sheets of tin, and a few other articles, alleged to belong to the plain-

tiff. The defendants pleaded the general issue and several special pleas, in which they averred that on the twenty-third day of October, 1885, E. W. Blatchford & Co. recovered a judgment against the Rock River Packing Company, in the circuit court of Whiteside County, for \$1,415.40; that an execution issued on the judgment, which was placed in the hands of defendants, as sheriff and deputy sheriff, to collect. It is also alleged that the goods named in the declaration belonged to the Rock River Packing Company, and as such they were levied upon by defendants under and by virtue of the execution, and sold in satisfaction thereof. Issue was formed on the pleas, and on a trial the plaintiff recovered a judgment for \$1,996.41, which was affirmed in the appellate court.

In order to get a correct understanding of the questions presented by the record, a brief statement of the facts seems to be required. The Rock River Packing Company is a corporation organized in 1881, with a capital stock of sixteen thousand dollars, the incorporators being James A. Ingersoll, Edward H. Sears, William N. Herman, and Joseph T. Miller, the plaintiff here. The corporation was formed for "packing, pickling, canning, and bottling of meats, vegetables, and fruits, and dealing in the same," and was located at Sterling, where it provided itself with a factory and warehouse, in which its business was transacted. During the spring and summer of 1885, the corporation borrowed of Miller, who was then a director, money to be used in its business, amounting to the sum of two thousand dollars. To secure Miller for the money loaned, the corporation executed and delivered to him its four judgment notes, one dated May 30, 1885, amount five hundred dollars; one July 6, 1885, amount five hundred dollars; and one for one thousand dollars, on August 17, 1885. On the sixteenth day of October, 1885, these notes being due and unpaid, the president and secretary of the corporation sold Miller 80,000 cans and a small quantity of tin for \$1,877, to be applied as a payment on the notes. On the same day, Ingersoll, president and secretary of the corporation, leased Miller two small rooms in the north end of the company's warehouse. On the morning of the 17th, all property belonging to the company was removed from the two rooms, and the possession was turned over to Miller. Miller placed the goods purchased in the rooms, and nailed up the doors communicating with other parts of the warehouse, and placed new locks on the other doors. On the seventeenth day of October, 1885,

the corporation delivered to E. W. Blatchford & Co. a judgment note for \$1,415.40, upon which judgment was entered. On the twenty-third day of October an execution issued on the judgment, and on the 24th, defendant Beach, as sheriff, and defendant Keefer, as deputy sheriff, levied on the goods which had been purchased by Miller.

In the circuit court it was contended that the sale of the goods from the Rock River Packing Company to Miller was fraudulent as against creditors, and being fraudulent, the goods were liable to be seized and sold by the sheriff on the execution in favor of Blatchford & Co. against the Rock River Packing Company. For the purpose of showing the sale fraudulent, the defendants offered to prove that the Rock River Packing Company was, at the time of the sale, insolvent; that on the sixteenth day of October, 1885, the company executed a mortgage on its real estate for seven thousand dollars to three of its directors; that the company turned over one thousand dollars of its accounts to the Sterling National Bank to apply on a debt due from the company to the bank, which debt was secured by three of the directors of the company; that between the sixteenth and the twenty-third days of October, the corporation sold the product of their manufacture to a certain party in Chicago. This offered evidence, with other evidence of a like import, was ruled out by the court, and the decision is relied upon as error. We are of opinion that the court erred in excluding this evidence from the jury. If, at the time this sale was made, the corporation was insolvent, or if, at or about the time when the sale was made, large mortgages were placed on all of the property owned by the corporation, so that it had no property left liable to execution, these were facts proper for the consideration of the jury on the question whether the sale to Miller was fraudulent or made in good faith. What weight should be given to this character of evidence was a question for the jury. We only determine that it was competent evidence for the consideration of the jury on the issue presented by the pleadings. Where the good faith of a sale of property is attacked, it is always competent to prove that the vendor was embarrassed or insolvent: *Geisendorf v. Eagles*, 106 Ind. 38; *Bump on Fraudulent Conveyances*, 591.

But appellants rely upon another ground to defeat the sale, — that it was void for the reason that Miller was, at the time, a director of the corporation, and could not contract with it.

This proposition is discussed in the argument under several distinct heads, and various authorities have been cited in its support. There is a conflict of authority on this question, but on the general proposition whether a director may deal with the corporation we think the weight of authority is that he may. This court so held in *Merrick v. Peoria Coal Co.*, 61 Ill. 479, and in *Harts v. Brown*, 77 Ill. 226. The supreme court of the United States hold the same doctrine. In *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, it is said: "It is very true that, as a stockholder, in making a contract of any kind with the corporation of which he is a member, he is in some sense dealing with a creature of which he is a part, and holds a common interest with the other stockholders, who, with him, constitute the whole of that artificial entity, and is properly held to a larger measure of candor and good faith than if he were not a stockholder. So when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing, in this regard, the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing is increased in the precise degree that his representative character has given him power and control, derived from the confidence reposed in him by the stockholders who appointed him their agent." See also the following authorities, where the same doctrine is announced: *Angell and Ames on Corporations*, sec. 233; *Whitwell v. Warner*, 20 Vt. 425; *Smith v. Lansing*, 22 N. Y. 526; *City of St. Louis v. Alexander*, 23 Mo. 483.

While a corporation remains solvent, we perceive no reason why a director, with the knowledge of the stockholders, may not deal with the corporation, loan it money, take security, or buy property of it in like manner as a stranger; but whether a director in an insolvent corporation may purchase the assets in payment of a debt, and thus secure a preference over other creditors, presents a different question. So long as a corporation remains solvent, its directors are agents or trustees for the share-holders. They owe no duties or obligations to others. But the moment a corporation becomes insolvent, its directors occupy a different relation. The assets of the corporation must then be regarded as a trust fund for the payment of all its creditors, and the directors occupy the position of trustees, and a fiduciary relation then existing, they may, with propriety, be prohibited from purchasing the trust property. The

relation that directors occupy to the property of a corporation is well stated in *Ogden v. Murray*, 39 N. Y. 202, as follows: "The appellants and their associates were not in a situation permitting them to secure to themselves a personal advantage in the matter. The stockholders and creditors were entitled not only to their vote in the board, but to their influence and argument in the discussion which led to the passage of the resolution, in pursuance of which they took title as trustees. This brings the case within the rule, which rests in the soundest wisdom, and is sustained by the best consideration of the infirmities of our human nature, and called for by the only safe protection of the interests of *cestuis que trust* or beneficiaries, viz., that trustees and persons standing in similar fiduciary relations shall not be permitted to exercise their powers, and manage or appropriate the property of which they have control, for their own profit or emolument, or, as it has been expressed, shall not take advantage of their situation to obtain any personal benefit to themselves at the expense of their *cestuis que trust*." See also *Drury v. Cross*, 7 Wall. 299.

In *Curran v. State of Arkansas*, 15 How. 307, Mr. Justice Curtis, delivering the opinion of the court, speaking of an insolvent banking corporation, says: "The assets of such a corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others not creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of the creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. This has often been decided, and rests upon the plainest principles."

In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263, on a bill in equity filed by creditors, it was held that directors and managers of insolvent corporations are trustees of the funds for the creditors, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves, to the injury of other creditors. It is there said: "Every agent and trustee who has claims of his own must be regarded as agent for himself and others, and bound to give his diligence and care equally to all the claims in his hands, and consequently to apply all moneys paid to him, without an appropriation by the debtor,

to the payment of all claims in his care, whether of his own or others, in just proportions to their amounts."

In *Morawetz on Corporations*, 1st ed., section 579, it is said: "It is the duty of the directors and other agents of an insolvent corporation to preserve its assets for the benefit of creditors. The legal ownership of the assets is not altered by insolvency, and the regular agents of the company retain the same powers of management with which they were originally invested. But upon the insolvency of the corporation, the equitable lien of creditors attaches upon all of the company's assets; and the directors, who originally stood in a fiduciary relation to the company's members, become placed in a fiduciary relation to its creditors. Accordingly, it has been held . . . that they cannot give away the company's property gratuitously, or sell it at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of other creditors."

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, where an action was brought to foreclose a mortgage given by the company to its directors to secure an indebtedness due from the company to them, on the hearing it appeared that at the time the mortgage was executed the company was insolvent, and it was insisted as a defense that the mortgage was invalid. The court, in deciding the case, said: "The main question is the validity of the mortgage in suit. There was abundant evidence to justify the finding of the circuit court that at the time it was given the company was insolvent. In such case the authorities seem to be uniform that the directors and officers of a corporation are trustees of the creditors, and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors. The directors are then trustees of all the property of the corporation for all its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees, as such." See also *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5; and *Lippincott v. Shaw Carriage Co.*, 21 Fed. Rep. 577.

The language used in *Merrick v. Peoria Coal Co.*, 61 Ill. 479, is broad enough to authorize a director of an insolvent corpo-

ration to deal with the corporation; but the question of the power of a director to purchase property of or deal with an insolvent corporation did not arise in that case, and what was said was mere *obiter dictum*. There the Peru Coal Company, a corporation, executed certain notes payable to the Michigan Car Company, and also drew certain drafts in favor of the company. These notes and drafts were purchased by Merrick, who was an officer of the corporation, with his own funds, and brought an action on the notes and drafts, and the only question was, whether he was entitled to recover, and the court properly held he might recover upon the notes and drafts.

Harts v. Brown, 77 Ill. 226, is another case where expressions may be found similar to those used in the Merrick case, which were not justified by the questions presented for decision. That was a bill brought by stockholders to vacate a sale under a trust deed given by the company to secure the payment of certain bonds issued by the company and sold to one of the directors. The question arose whether the company had the power to execute a trust deed, and whether it could borrow money of a director. It was held that the charter conferred power to borrow money and secure it by mortgage or deed of trust, and that the board of directors might borrow money of one of its members. The question before the court was properly decided, but the expression that a director may trade with, borrow from, or loan money to the company of which he is a member, on the same terms and in like manner as other persons, was not authorized by the case made by the record.

After a careful examination of the authorities, we are inclined to the opinion that if this corporation was insolvent at the time of the sale, Miller, who was a director, could not lawfully purchase the property in satisfaction of his own debt to the exclusion of other creditors, but he took the property charged with the trust in favor of other creditors, which may be enforced in an appropriate action. Miller, being a creditor, would doubtless be entitled to share with the other creditors in the property, but he could not appropriate the entire amount to the payment of his own debt. This, however, conferred no right upon appellants to seize the property, and sell it in satisfaction of the debt of Blatchford & Co. As creditors of the corporation, they occupied no better position than Miller. It may be, and no doubt is, true, that if Blatchford & Co. had levied on the property while in the hands of the corporation,

before the sale to Miller, they would, under such circumstances, have been entitled to hold it. But after the sale and delivery to Miller they had no such right; the property had passed beyond the reach of their execution. It had passed into Miller's hands charged with a trust which a court of equity might enforce in favor of all the creditors of the corporation, or such as might invoke the aid of that court.

One other question remains to be considered. The sale was made to Miller without an order of the board of directors of the corporation, and upon this ground it is claimed to be invalid. Conceding that the sale was irregular, we think it might be ratified by the corporation, and the fact that it took up the notes held by Miller and canceled them, and retained them in its possession, may be regarded as a ratification of the sale. As to the lease of that part of the building where the goods were stored, whether it was strictly valid or invalid was of no moment. The only purpose of the lease was to give Miller possession of that part of the building, and there was ample evidence to establish possession independent of the lease.

For the error indicated, the judgments of the appellate and circuit courts will be reversed, and the cause remanded.

DIRECTOR AND CORPORATION, TRANSACTIONS BETWEEN. — Directors of a corporation are sometimes spoken of as its trustees, and at other times, with more accuracy, their relation to it is compared with that of a trustee to his *cestui que trust*. They are not trustees in the sense of holding the legal title to all or any of its property for the benefit of the corporation or of its stockholders or creditors. It is true that its directors are, upon sound principles of public policy, inhibited from dealing with the corporation under very much the same circumstances that a trustee is inhibited from dealing with his *cestui que trust*, and if they disregard the duties and proprieties of their position by undertaking to represent their own interest and that of the corporation at the same time, they will not be encouraged in thus walking in the path of temptation, nor be permitted to retain the fruits gathered while in pursuit of their own advancement when they should have pursued none other than that of the corporation: *Memphis & O. R. R. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81. The relation of director and corporation is, however, merely that of principal and agent, and transactions between a director and a corporation are sustainable when they could be sustained between a principal and agent, and not otherwise, with this exception, that as a corporation may have no other means of obtaining information respecting a transaction and its subject-matter than through its director, he may have more difficulty than if his principal were a private person in establishing that, in its dealings with him, the corporation was not overreached by means of his superior knowledge and its reliance upon him as its agent and representative.

Undoubtedly there are expressions in several decisions from which the inference might be drawn, either that a director is absolutely incompetent to

contract with his corporation, or to deal with it, in any matter in which he is personally interested, or, at least, that the corporation may at any time avoid or disregard such contract or other transaction, whether fair or unfair, advantageous or prejudicial: *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 6; *Aberdeen R'y Co. v. Blakie*, 1 Macq. 461. These expressions, however, were generally arguments adduced in justification of judgments about to be entered, and while they doubtless adequately supported such judgments, they are of doubtful applicability in cases in which the real question is, whether or not a director was disqualified from contracting or otherwise dealing with his corporation. In *Pickett v. School District No. 1*, 25 Wis. 551, 3 Am. Rep. 105, the court said: "We think there is one fatal objection to the plaintiff's right to maintain this action, which renders it unnecessary to consider any of the other questions discussed. That is, that inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a member. The general principle upon which this position must rest is, that no man can faithfully serve two masters whose interests are in conflict. And as men usually and naturally prefer their own interests to those of others, where one attempts to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity. This principle has been most frequently illustrated in cases of sales by officers, agents, and trustees, in all of which it has been held that they cannot become the purchasers, because this would allow their interests to come in conflict with their duties to their principals. The same doctrine is as applicable to the question of taking a contract as that of making a sale. And the only doubt would be, whether it should be held applicable in a case where a board, consisting of several, are authorized to act in a fiduciary capacity, and attempt to deal in that capacity with one of their own members. I think it is; and that although the impropriety of it would not be so glaring as in the case of a single agent dealing with himself, yet the danger of undue and improper influences, and of frequent sacrifices of the interest of the principal in a manner not always open to detection, would be extremely great."

The court employing the language just quoted relied upon *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, and *People v. Township Board*, 11 Mich. 222, both of which were in point. In fact, the case last cited is an extreme one. It is vaguely reported. As we understand it, certain persons who were members of a board of freeholders, and, as such, authorized to participate in the letting of a contract, themselves bid for, obtained, and fully performed such contract, and being refused payment for the services rendered, applied for a writ of mandate to compel the allowance and payment of their demands. Though the applicants for the writ did not constitute a majority of the board of freeholders, and it did not appear that their votes were essential to procure them the contract, the court declared it void, and denied them relief. This is, perhaps, the only American case maintaining that the corporation may accept and knowingly retain the fruits of the contract, and yet avoid payment on the ground that the contract, being against public policy, is void to the extent that no rights whatever can be based upon it. In the Wisconsin case, previously quoted, the court conceded that "perhaps the true theory is, that in all cases where the principle we have discussed is applicable, the contract is rather voidable in equity at the option of the principal

than absolutely void at law. Undoubtedly, in such cases, the principal, having full knowledge of all the facts, may affirm the contract. And if he should do so, it would become binding. If it had been fully executed by the contracting party, and the principal should, knowing all the facts, elect to accept and retain the benefit of it, he might be held to have thereby ratified it according to all its terms and conditions. And where it had not been so executed, but had been partially fulfilled, and he elected to accept and retain such partial benefit, he might become liable, upon a *quantum meruit*, upon the same principles as in other cases." In *San Diego v. S. D. & L. A. R. R. Co.*, 44 Cal. 106, the plaintiff, a municipal corporation of the state of California, brought an action to have a deed declared void, and canceled as a cloud upon its title. The deed in question was executed to the defendant by two of the plaintiff's trustees, and purported to convey to the defendant certain lands belonging to the plaintiff, pursuant to an act of the legislature under which the trustees of plaintiff were authorized to select and convey certain lands to the defendant at such prices as such trustees might deem advisable, and upon such terms and conditions as they might determine. At the time when the resolution was passed by the plaintiff's trustees, directing a deed to be given the defendant, one of the trustees voted in the negative and two in the affirmative, and of the two thus voting in the affirmative, one was interested in the defendant corporation, being both a stockholder and a director therein. The deed made pursuant to the resolution was adjudged void, and canceled; but this adjudication might well be rested solely upon the ground that the vote by which it was carried included that of the director of the defendant corporation, and that without his vote no resolution whatever could have been passed.

It is unquestionably true that a director acting in his quasi legislative capacity as a member of a board of trustees is incompetent to act in matters in which his interest is adverse to the corporation. Probably an interested director may be counted as one of the parties whose presence is necessary to constitute a quorum of a board of directors, and if a resolution could have been adopted, had he voted against it, the mere fact that his presence was necessary to constitute a quorum will not deprive the resolution of validity: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516. His vote, however, cannot properly be counted when it is necessary to constitute a majority, if the question is one in which he is personally interested, and if, without his vote, the resolution could not have been carried by the requisite number of votes. In other words, it is not adopted at all, and he cannot enforce any claim or right which is based solely upon it: *Bennett v. St. Louis Car Roofing Co.*, 19 Mo. App. 349; *Chamberlain v. Pacific Wool G. O. Co.*, 54 Cal. 103. Hence a resolution fixing the compensation of the president of a corporation cannot be regarded as binding upon it if his vote was necessary to the adoption of such resolution. *Copeland v. Johnson Mfg. Co.*, 47 Hun, 235. If a resolution authorizes the renewal of two notes, one of which is in favor of a director, and the other in favor of a third person, and the vote of such director is necessary to constitute a majority of the quorum, by which alone the resolution can be passed, it will, if so passed, be absolutely void, and it can neither support the note of the director nor that of the third person: *Smith v. Los Angeles I. & L. C. Ass'n*, 78 Cal. 289; 12 Am. St. Rep. 53.

Where a director does not at the same time represent his own interest and that of a corporation, there is little or no doubt that he may contract with it, and buy or sell its property, or borrow its money and give his note therefor, or loan it his money and take in consideration thereof its notes and other

securities, and enforce their payment in case default should be made therein: *Ward v. Polk*, 70 Ind. 309; *Beach v. Miller*, 23 Ill. App. 151; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461; *Ten Eyck v. P. O. & P. A. Ry Co.*, 74 Mich. 226; 16 Am. St. Rep. 633. Contracts and other transactions between a director and his corporation are not void at law, though they are often voidable at the instance of the corporation: *Little Rock & F. S. Co. v. Page*, 35 Ark. 304. In fact, a purchase by a director of the property of his corporation cannot be regarded in a more unfavorable light than a purchase by a trustee of the property of his *cestui que trust*, in which event the latter may undoubtedly have the purchase set aside by repudiating it within a reasonable time after it comes to his knowledge: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Ashhurst's Appeal*, 60 Pa. St. 290. If a *cestui que trust* knew of and assented to the purchase before it was made, his right to subsequently set it aside, if its existence can be affirmed at all, must be placed upon the ground that his relation to his trustee is such as to give the latter an undue ascendancy over him, and to deprive him either of freedom of action or of power to properly judge of his own business affairs. Though the relations of a director and his fellow-directors are such as often to give him and them opportunity and inducement for collusive action to the detriment of the corporation, it cannot be said that a contracting director's relation to his fellow-directors is such as necessarily or ordinarily to give him an undue ascendancy over them, or to deprive them of the power to correctly understand and judiciously manage the affairs of the corporation. Therefore, if it is clear that a contract or other business transaction entered into between a director and the corporation was not tainted by collusion between him and his fellow-directors, and that they represented the corporation according to their best judgment, and that the contract or other transaction was open and fair, and without any concealment on the part of the contracting director, and without taking advantage of any information which he may have had to the exclusion of his fellow-directors, then his contract or other transaction should not be treated as voidable until avoided, but as unavoidable and therefore as enforceable, both at law and at equity, whether the corporation acquiesces in or resists such enforcement: *Watt's Appeal*, 78 Pa. St. 370; *Deane v. Hodge*, 35 Minn. 146; 59 Am. Rep. 321; *Beach v. Miller*, 130 Ill. 162; *ante*, p. 291; *Twinn Lick Oil Co. v. Marbury*, 91 U. S. 587; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461.

It is of the utmost importance that a corporation and its officers should know whether or not a director who is participating in its management has an interest adverse to that of the corporation, or is deriving secret profits out of transactions in which he is believed to have no interest, other than as a member or officer of the corporation. If a director is about to contract with a corporation, or to cause it to enter upon a business transaction, in or from which he may derive a profit or personal interest, he must let his fellow-officers know his true situation. Otherwise the corporation, upon becoming aware of his interest, may elect either to rescind the transaction, or to charge him as its trustee and compel him to account to it for any profits which he may have realized; and no device to which he may have resorted to conceal his true interest will be sufficient to protect him in equity from the operation of this rule.

One of the most familiar devices fraudulent in law resorted to by directors for the purpose of furthering their own interests to the detriment of the corporation is that of forming another corporation for the purpose of entering into advantageous contracts or transactions with the principal corpora-

tion. Thus, during the construction of the Union Pacific railway, the executive committee of the board of trustees entered into a contract with Godfrey and Wardell that the latter might prospect for coal along the whole line of the Union Pacific railway and its branches and extensions, and open and operate any mines discovered, and that the railroad company would purchase of them all marketable coal needful for engines, depots, shops, and other purposes, and pay therefor certain prices specified in the contract. Afterwards, a corporation was formed, called the Wyoming Coal and Mining Company, to develop and work coal mines, and a majority of the stock therein was taken by six of the directors of the railway company, and to this last formed corporation the contract with Godfrey and Wardell was by them assigned. Wardell was an officer and manager of the coal company, and the railroad company having by order of its directors taken forcible possession of the mines and other property of the coal company, he brought an action in his own name to have an account taken of coal delivered to the railroad company, and for the ascertainment and settlement of the rights and interests of the several parties to the action. To this suit the railroad company answered that the original contract with Godfrey and Wardell was a fraud upon the company; that it was made on its part by the executive committee of its board of directors, and that a majority of this committee had, before entering into the contract, made an agreement by which they were to be interested with the contractors, and on that account the terms of the contract were made so favorable to the contractors and were so unfavorable to the company as to enable the former to make large gains at the expense of the latter, and that the organization of the coal company was a mere device to enable these directors to participate in the profits, and that therefore the contract was of no validity and binding obligation on the railroad company. The trial court found the answer of the railroad company to be true, and determined that the contract was a fraud upon the company, and that the complainant was not entitled to any redress based upon the contract. In affirming this decision, the supreme court of the United States said: "It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another, whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases, duty would be overborne in the struggle': *Marsh v. Whitmore*, 21 Wall. 183. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railway company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they or some of them will take stock in it, and then that valuable contracts shall be given to it, in the profits which

they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration: *R. R. Co. v. Magney*, 25 Beav. 586; *Benson v. Heatheron*, 1 Younge & C. Ch. 326; *Phet R. R. Co. v. Downey*, 14 Mich. 477; *European etc. R. R. Co. v. Poor*, 59 Mo. 277; and *Drury v. Cross*, 7 Wall. 299. The scheme discloses here no feature which relieves it of its fraudulent character, and the contract of July 16, 1868, which was an essential part of it, must go down with it. It was a fraudulent proceeding on the part of the directors and contractors who devised and carried it into execution, not only against the company, but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands. By the very terms of the charter of the company, five per cent of its net earnings were to be paid to the government. These earnings were necessarily reduced by every transaction which took from the company its legitimate profits. It is true that some of the directors who approved of or did not dissent from the contract early stated that they held their stock in the coal company for the benefit of the railroad company, and transferred it, or were ready to transfer it, to the latter; but the majority expressed such a purpose only when the character and terms of the contract became known, and they were desirous to screen themselves from censure for their conduct"; *Wardell v. Union Pacific Railway Co.*, 103 U. S. 651. A somewhat similar case was that of *Thomas v. Brownville etc. Ry Co.*, 109 U. S. 522, in which it appeared that the directors of the railroad company contracted with a construction company in which some of them were interested, and upon substantial consideration to other directors, and it was determined that this contract was fraudulent and void; that the construction company could maintain no suit upon it; and that the bonds given in pursuance of it could not be enforced unless they were negotiable instruments in the hands of innocent purchasers for value; but that, on a suit to foreclose a mortgage given in pursuance of the contract for the construction of the railroad, relief might be had upon a *quantum meruit* for the work actually done and accepted without regard to the prices fixed by the contract, and that the mortgage should stand as security for the reasonable value of what the railway company actually received in the way of construction.

If a director has any interest in a transaction of which the corporation is not informed, and he realizes profits therefrom, the corporation may, by proper suit, compel him to account for and to pay over to it such profits: *European and North American R. R. Co. v. Poor*, 59 Mo. 277; *Great Luxembourg R. R. Co. v. Magenay*, 25 Beav. 586; *Benson v. Heatheron*, 1 Younge & C. 224. This rule is well sustained and illustrated by *Formers' and Merchants' Bank v. Downey*, 50 Cal. 466; 31 Am. Rep. 62. In that case, it appeared that a director in a banking corporation loaned its moneys, taking proper notes for the repayment thereof, and exacting as a condition precedent to the granting of the loan an agreement that he should have a share in the profits of the purchase of lands, which the borrower expected to affect with the aid of the money so borrowed. The corporation, subsequently becoming advised of this agreement, demanded that its director assign the same to it, and this demand being refused, brought a suit to charge the director as its trustee. In sustaining the relief demanded, the court said: "Upon well-settled principles governing courts of equity, the defendant cannot be permitted to retain these profits for himself. They constituted part of the consideration which the borrower paid, or agreed to pay, in obtaining the

loan, and are as clearly the property of the corporation as is the interest accrued and stipulated to be paid on the face of the note itself. In making the loan, the defendant was acting as director of the corporation, plaintiff here. He was its trustee. All officers and directors of a corporate body are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages not common to the latter."

A trustee's authority to represent a corporation must be interpreted as extending only to cases in which he has no personal interest; and if he undertakes to exercise it in a case in which he has an interest, the transaction may be treated as unauthorized. Thus if a president of a bank which holds the note of a director purchases of the latter his stock in the bank, and directs the cashier to hold the stock in place of the note, and to surrender the note, this act, being in the personal interest of the president, is not within the limits of his authority. The surrender of the note by the cashier is therefore invalid, and its payment may still be enforced: *Rhodes v. Webb*, 24 Minn. 292. If a trustee or other officer of a corporation, acting in its behalf, enters into a contract for building and equipping a road, and afterwards a portion of the contract is assigned to him, he will not be permitted, as against the corporation, to retain any portion of the profits or proceeds of such contract: *Flint & P. M. R'y Co. v. Dewey*, 14 Mich. 477. If a note is made by the directors of one corporation, as individuals, and transferred to another corporation, and one of the makers of the note is also the payee and indorser thereof, and is president of both corporations, he cannot, as an officer of the corporation to which the note is thus transferred, consent to any arrangement releasing or impairing the individual liability of himself or of his co-directors: *Gallery v. National Exchange Bank*, 41 Mich. 169; 32 Am. Rep. 149. If a director is, by a resolution of the board, authorized to borrow money, and to execute therefor a mortgage of the corporation, the money so borrowed to be applied to the payment of the corporate debts, and he purchases such debts, assigns them to a firm of which he is a member, and then executes a mortgage to such firm in the name of the corporation, the execution of such mortgage will be treated as unauthorized: *Davis v. Rock Creek F. L. M. Co.*, 55 Cal. 359; 36 Am. Rep. 40. In this case, the court, in addition to holding that the execution of the mortgage was unauthorized, expressed the opinion that the mortgage was also incapable of enforcement, upon the further ground that the director, in executing it, and in the transactions preceding its execution, was representing conflicting interests. The language of the court upon this subject was as follows: "But, apart from this consideration, the transaction in question cannot be upheld. The law, for wise reasons, will not permit one who acts in a fiduciary capacity thus to deal with himself in his individual capacity. The position of A. Wolf as a member of the firm of A. Wolf & Co., and his position as trustee and president of the corporation defendant, were inconsistent and conflicting. In purchasing the debts of the corporation in his individual capacity, it was to his interest to buy them at as great discount as possible. The greater the discount, the greater the gain. If he succeeded in purchasing the debts at any discount, to that extent he secured to himself an advantage not common to all the stockholders. To permit this to be done would be to permit the violation of one of the plainest principles of equity applicable to trustees. In this particular case, it does not appear that Wolf secured the demands against the corporation at any discount; neither does it appear that he did not. Nor does the policy of the law permit any inquiry into that question. Occupying, as he did, the position of

trustee, he should not have put himself in a position adverse to his *cestui que trust*. One cannot faithfully serve two masters whose interests are diverse." Other cases illustrating the rule that directors, because of their fiduciary relations to the corporation, are inhibited from speculating with its funds for their own benefit, or from making secret profits on transactions entered into by them on its behalf, are cited in the note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 642, to which the reader is referred.

In all cases where a director acts secretly, as where he takes a contract or obligation of the corporation for his own benefit, in the name of a third person, there is little doubt that a court of equity will either vacate it or compel him to account to the corporation for all profits and advantages derived from or under it. Thus where a director of a corporation procured its notes and mortgage to be made to his partner, who, however, never had any real or beneficial interest therein, and never advanced any part of the consideration, and the director advanced a certain sum of money in the name of his partner, and procured therefor the notes and mortgage already mentioned, and the rate of interest stipulated in the notes was excessive, and the amount thereof greater than the sum actually borrowed, the excess being intended to secure the lender against taxes on the mortgage, it was determined that the corporation was entitled to have the notes and mortgages canceled, upon payment of the actual amount advanced, with reasonable interest thereon according to the current market rates at the time when the loan was made, and without paying any of the additional sum stipulated to be paid over and above the amount actually loaned: *Sutter Street R. R. Co. v. Baum*, 66 Cal. 44.

The cases assert in general terms the right of a corporation to elect to rescind or set aside all contracts between the corporation and one of its directors upon prompt and reasonable application. Thus *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456, 77 Am. Dec. 311, was a suit in equity seeking, among other things, to have declared void certain deeds by the plaintiff corporation to one of its directors and a third person. The plaintiff contended that the conduct of the director had been fraudulent; in fact, that he had brought about the sale of the lands in question through his influence as a director, and with a view to profit thereby to the detriment of the corporation. The court, however, was of the opinion that the evidence did not require it to brand the motives of the director and his fellow-grantees as willfully dishonest. It did not rest its judgment upon the ground that the director had taken advantage of his position or of superior information possessed by him, but maintained the broad proposition that a transaction between a corporation and one of its directors, like one between a *cestui que trust* and his trustee, is voidable at the instance of the former, and that no inquiry would be made to ascertain whether it was for his benefit as long as he was unwilling to remain bound by it. The court of errors and appeals of the state of New Jersey, in *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 522, expressed its views upon this topic as follows: "The position thus assumed by the plaintiff rests upon the broad principle that it was the duty of the director to so deal with the property and franchises of the corporation—to so manage its affairs—as would most conduce to the corporate interest, and that he would not perform that duty while contracting with it in his own behalf, or if, by possibility, his own interest was consistent with the best interest of the company in so contracting, yet, so insidious are the promptings of selfishness, and so great is the danger that it will override duty when brought in conflict with it, that sound policy requires that such contract should not be enforced or regarded. After an examination of all the cases cited, and

such others as I have found, and a careful consideration of the principle and the results of regarding and of disregarding it, I have come to the conviction that the true legal rule is, that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust*, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this. A director of a corporation may have rights not arising out of express contract, such as the right to pass over its railroad, or transport his goods over its canal, on paying reasonable tolls, or to have money which he has loaned it repaid to him; but where the right is one which must stand, if at all, upon an express contract, and which does not arise by operation or implication of law, then he shall not hold it against the will of his *cestui que trust*; for in the very bargain which gave rise to it, in which he should have kept in view the interest of that *cestui que trust*, there intervened before his eyes the opposing interest of himself. The vice which inheres in the judgment of a judge in his own cause contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, the judgment must fall. It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the *cestui que trust* than any one else, but the opportunities for self-advancement at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than those isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of the board of directors to support his contract with his company upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargain with his co-directors. The very words in which he asserts his right declare his wrong; he ought to have participated, and in the interest of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained; he must hold against them no advantages that he has got through neglect of his duty towards them. Many authorities exemplifying the rule may be found." Of the propriety of these views as applied to cases in which a purchasing or contracting director has undertaken to represent both himself and the corporation, there can be no doubt: *Gardner v. Butler*, 30 N. J. Eq. 702; *N. Y. Central I. Co. v. National Prot. Ins. Co.*, 14 N. Y. 85. So if contracts are entered into between two corporations, a majority of the boards of directors of each, consisting of the same persons, the interests which they assume to represent being adverse, such contracts may be set aside at the instance of any person having an interest which may have been sacrificed; and the contracts cannot be sustained by proving that the directors, though they represented conflicting interests, acted in good faith: *Pearson v. Concord R. R. Co.*, 62 N. H. 537; 13 Am. St. Rep. 590; *Goodin v. Cinn. & W. C. Co.*, 18 Ohio St. 169; 98 Am. Dec. 95; *Memphis & C. R. R. v. Woods*, 88 Ala. 630; 16 Am. St. Rep. 81.

From the general rule, hereinbefore asserted, that a purchase made by a director from his corporation, or a contract entered into between him and it, is not void, but voidable only at the instance of the corporation, it follows that a third person cannot treat it as void, and proceed as though it had not been made, or if made, had already been avoided by the corporation: *Jones v. Arkansas A. & M. Co.*, 38 Ark. 17.

A director of a corporation, as is already shown, may contract with it in cases where he does not represent both parties, may purchase its notes and drafts or loan it money, and, to some extent at least, deal with it in the same manner as a stranger: *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226; *Garrett v. Burlington P. Co.*, 70 Iowa, 697; 59 Am. Rep. 461. It necessarily follows from this that he may accept or enforce payment of his debt under ordinary circumstances. Payments made in the usual course of business, and not in view of the probable insolvency of the corporation, and while it expects in good faith to proceed with its business, are not frauds upon the other creditors, and cannot be recovered by them of the directors to whom such payments were made: *Hoit v. Bennett*, 146 Mass. 437.

If a corporation does not voluntarily pay a debt due to it from one of its directors, he may undoubtedly coerce payment by any appropriate action. At a sale under the judgment which may be entered in such action, he may become a purchaser of the corporate property, and may retain the benefit of such purchase, unless it is for so inadequate a price as to excite suspicion that the director therein acted unfairly in the sale, or in not having the corporation effect a redemption: *Hallam v. Indianola Hotel Co.*, 56 Iowa, 178. A director may also become a purchaser of the property of the corporation at a sale made under a mortgage executed by it: *Salt Marsh v. Spaulding*, 147 Mass. 224. He may also become a purchaser of the property at an execution or judicial sale, though in either event it is probable that the corporation may elect to compel him to hold the property for its benefit, or to disaffirm the sale and have the property resold: *Hoyle v. Plattsburg M. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595; *McAllen v. Woodcock*, 60 Mo. 174; *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501.

The right of a director to exact payment of a debt due him from the corporation must not be so exercised as to give him a preference over its other creditors, and if so exercised, the preference will be set aside: *Hopkins's Appeal*, 90 Pa. St. 69; *Smith v. Putnam*, 61 N. H. 632; *Adams v. Kehler Mining Co.*, 35 Fed. Rep. 433. Directors of an insolvent corporation are trustees of its funds and property, for its creditors as well as for the corporation and its stockholders, and are bound to apply such funds *pro rata* to the payment of the corporate debts, and not use them to pay their own debts or to exonerate themselves to the injury of their creditors: *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263. If a corporation is insolvent, and its directors, or some of them, are among its creditors, every device resorted to for the purpose of giving them a preference over its other creditors is fraudulent and void as against them. Hence a mortgage given for such a purpose cannot be enforced: *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; 59 Am. Rep. 466. A conveyance made to such directors in payment of their debts will be vacated at the instance of the other creditors injuriously affected thereby: *Beach v. Miller*, 130 Ill. 162; *ante*, p. 291; *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88.

In Illinois, it has been decided that when a corporation was insolvent, and without means to discharge its debts or to redeem its property, which had been sold at judicial sale, and the directors gave all the stockholders an opportunity to make advances to relieve the company, which they refused to do, then that the directors who afterwards purchased the indebtedness due from the corporation, and acquired title to the corporate property by enforcing its sale under a deed of trust given to secure such indebtedness, were entitled to hold such property for their own benefit, and that the other stockholders, who refused to make such advances had no just cause of complaint:

Harts v. Brown, 77 Ill. 226. The courts of Iowa have proceeded one step further, and have placed directors who take and enforce the securities of an insolvent corporation on substantially the same basis as though they were strangers to the corporation, and have refused to permit such securities to be assailed except upon the ground that the directors were guilty of bad faith or dishonest practices, and this although the debts for which the security was given were in excess of the indebtedness prescribed by the articles of incorporation: *Garratt v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461. The court in this case said that it could not assent to the proposition "that a director of an insolvent corporation cannot take from it security by mortgage or other conveyance creating a lien upon its property, even though given in good faith and without fraud in the transaction. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way take its property in security. If the property, money, or other consideration of the debt was fairly used for the benefit of the corporation, was added to its assets, or used in its business, it would be unreasonable to hold that the director is deprived of rights and remedies held by other creditors."

A contract which is originally voidable because entered into between two corporations, represented by the same persons as trustees of both, or because entered into between a corporation and one of its directors, may subsequently be ratified, and becomes enforceable, and such ratification may be presumed from the long-continued acquiescence of the corporation: *U. S. Rolling Stock Co. v. Atlanta etc. R. R. Co.*, 34 Ohio St. 450. "The law governing questions of ratification in cases like the present is well settled. To render the act of ratification effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information, and of perfect freedom of volition. And, in addition to all this, the *cestui que trust* must not only have been acquainted with the facts, but apprised of the law, how those facts would be dealt with if brought before a court of equity": *Hoffman Steam Coal Co. v. Cumberland C. & I. Co.*, 16 Md. 456; 77 Am. Dec. 311.

CHICKERING v. BASTRESS.

[189 ILLINOIS, 206.]

CONTRACTS — CONSTRUCTION — SALE OR BAILMENT. — Whether an agreement between parties is designed, under the device of a consignment for sale, to preserve in the vendor a lien upon goods, or whether it constitutes a bailment, is a question of law for the court, though the question whether there was actual fraud or intent to defraud creditors in entering into the agreement is one of fact for the jury.

CONTRACT — CONSTRUCTION — SALE OR BAILMENT. — When the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed. When there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor, the title to the property is changed, and the transaction is a sale.

CONTRACT OF SALE RESERVING SECRET LIEN VOID AS TO CREDITORS. — Whatever the form of the agreement, if its purpose is to cover up a sale and preserve a lien in the vendor for the price of goods, it is void as to his creditors, whether credit was given before or after the delivery of the goods. A consignment for such object is no better than any other device.

CONTRACT OF SALE RESERVING SECRET LIEN VOID AS TO CREDITORS. — Where a party, by means of a contract, but without notice to the world, suffers the real ownership of chattels to be in himself and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the execution or attachment creditors of the latter, because to injure third persons by giving a false credit to such ostensible owners is the natural and probable result of the transaction.

REPLEVIN by Chickering and Sons against J. Bastress, S. F. Hanchett, as sheriff, and the individual members composing the firm of Pelton, Pomeroy, and Cross, to recover the possession of seventeen pianos which came into the possession of the latter firm under an agreement which is sufficiently stated in the opinion. The pianos were levied upon as the property of Pelton, Pomeroy, and Cross, under an execution issued upon a judgment in favor of Bastress and against such firm. Upon the second trial of this case the defendants obtained judgment, which was affirmed by the appellate court, from which judgment an appeal is taken.

Lyman and Jackson, and Allan C. Story, for the appellants.

H. W. Magee, for the appellees.

MAGRUDER, J. All the questions of fact involved in the case, including the question whether or not there was actual fraud on the part of the Chickering and Cross in entering into the agreement in question, were properly submitted to the jury

under the instructions which were given, and are settled, so far as we are concerned, by the judgment of the appellate court.

The main question, which arises upon exceptions to the giving and refusal of instructions in the case, relates to the proper construction to be given to the agreement between Chickering and Sons, and Pelton, Pomeroy, and Cross. Upon this subject we concur in the following views, expressed by the late Justice McAllister in delivering the opinion of the appellate court:—

“But the question as to what was the real object or purpose of the parties to that agreement, — whether it was designed to cover a sale of the pianos from the Chickerings to Pelton, Pomeroy, and Cross, and under the label or device of a consignment for sale to preserve in the vendors a lien upon the goods, or whether it constituted a contract of bailment, — were questions to be determined by the court upon a construction of the instrument, fairly considering all its provisions, with the view of finding therefrom what was the real intention of the parties. Those, undoubtedly, are pure questions of law: *Murch v. Wright*, 46 Ill. 487; 95 Am. Dec. 455; *Hervey v. Rhode Island L. Works*, 93 U. S. 664; *Heryford v. Davis*, 102 U. S. 235; *Fish v. Benedict*, 74 N. Y. 613.

“As pertinent to those questions, we may briefly state that the contract provides, — 1. That the prices at which Pelton, Pomeroy, and Cross were to take the pianos of the Chickerings were to be agreed upon and expressed in the invoices. 2. Pelton & Co. were to pay out of their own pockets all freight charges and costs of shipment, to keep them insured for the benefit of the Chickerings, the former paying the premiums. 3. Pelton & Co. were at liberty to sell the pianos at such prices as they chose to fix upon them, and to have all they could get over and above the invoice prices, in full for all charges, commissions, expenses, etc. When they sold one or more, they were to remit the invoice price to the Chickerings, and that should be in payment and discharge for the pianos so sold. 4. Advances might be made by Pelton & Co. by negotiable paper, and when such paper was paid it should transfer the title to the particular pianos for which such paper was given. 5. All pianos delivered by the Chickerings to Pelton & Co. were subject to the order of the former, and their right to transfer, remove, sell, or repossess themselves of the same, at any time, without notice.

“The last clause we regard as in the nature of the insecurity

clause usually inserted in chattel mortgages. Is this a contract of bailment? It is well settled in this state that when the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor to make a return, and the title to the property is changed; it is a sale: *Loneragan v. Stewart*, 55 Ill. 49, and authorities there cited; *Richardson v. Olmstead*, 74 Ill. 213. Sir William Jones, in his work on bailments (2d ed.), 102, says: 'It may also be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others equal in value. In the first case it is regular bailment; in the second, it becomes a debt.'

"It is indisputable that, under the contract in question, Pelton & Co. were vested with the power and right of discharging themselves from any further obligations, as respected all the pianos mentioned in any one invoice, by paying to the Chickering the negotiable promissory note given therefor, but which, for the purpose of disguising the real nature of the contract, is therein called an 'advance.' In our opinion, it was not a contract of bailment, and the provisions authorizing Pelton & Co. to determine solely for themselves at what prices they would sell the pianos from their store is almost conclusive that in reality they were not acting as the agents or factors of the Chickering; but that, with the further provision that they were to bear as their proper burden all the expenses of shipment, etc., the same, precisely, as purchasers, would leave no doubt that the contract was not one of bailment or of principal and factor.

"The form of the agreement was that of consignment for sale, but its real purpose was to cover up a sale and preserve a lien in the Chickering for the price of the pianos. The invoices used are in perfect harmony with this view. They contained conditions which were to be considered as agreed to, and one of them was: 'The agents of this firm [Chickering and Sons] are its customers, who are engaged in selling its pianos in the territory allotted to them. Such customers are not agents in any sense known to the law,' etc. Then follows: 'It is agreed that the pianos specified in this bill are bought and sold upon the conditions herein set forth.' It is true that

the word 'consigned' was written across the bill, but there is no magic in that word which can take from the transaction its real character.

"In *Thompson v. Paret*, 94 Pa. St. 275, the court says: 'Whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit was given before or after the delivery of the goods. A consignment for such objects is no better than any other device.' The same view was taken in *Murch v. Wright*, 46 Ill. 487, 95 Am. Dec. 455, where the device was a pretended lease. So, also, in *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664. The cases cited are authority for the doctrine that where one party, by means of contract, but without notice to the world, suffers the real ownership of chattels to be in himself, and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the execution or attachment creditors of the latter, because to injure third persons by giving a false credit to such ostensible owners is the natural and probable result of the transaction: *Rose v. Story*, 1 Pa. St. 190; 44 Am. Dec. 121; *Martin v. Mathiot*, 14 Serg. & R. 214; 16 Am. Dec. 491; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; 37 Am. Rep. 661; *Brunswick v. Hoover*, 10 Week. Not. Cas. 219.

"We are of opinion that the agreement in question was void as respects Bastress, the execution creditor, and the sheriff for the reasons just stated."

The views thus expressed are not inconsistent with those presented in the case of *Gray v. Agnew*, 95 Ill. 315, referred to by counsel for appellants. In the latter case, the opinion of the court proceeded upon the assumption that there was a consignment of goods, and that the fact of such consignment was not denied by either party. Here, however, the question is, whether a contract in writing can be properly construed to be a contract for the consignment of goods, or a contract for the sale of goods.

The judgment of the appellate court is affirmed.

CONTRACTS — SALE OR BAILMENT. — For the distinction between a sale and a bailment, see note to *Bretz v. Diehl*, 2 Am. St. Rep. 711-713; *Wheeler, etc. Mfg. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575; *Barnes v. McCrear*, 75 Iowa, 267; 9 Am. St. Rep. 473; *Foreman v. Drake*, 98 N. C. 311; *Baldwin v. Crow*, 86 Ky. 679.

WHERE THE OWNER OF PROPERTY CLOTHES ANOTHER WITH APPARENT TITLE, and thereby induces third parties to believe that he has parted with the title, he is estopped to deny the title of the apparent vendee: *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184, and note 198-201. The rights of third parties growing out of a conditional sale cannot be infringed without notice of the conditions of the sale: *Lincoln v. Quinn*, 68 Md. 299; 6 Am. St. Rep. 446; *Thatcher v. Union Scale Co.*, 74 Iowa, 117; but it is otherwise when third parties have notice: *Gerow v. Castello*, 11 Col. 560; 7 Am. St. Rep. 260.

In North Carolina, conditional sales must be in writing and recorded before they can operate against creditors: *Foreman v. Drake*, 98 N. C. 311; *Harrell v. Godwin*, 102 N. C. 330; and to the same effect is *Kinney v. Coy*, 39 Minn. 210. But when a sale is absolute, and not conditional, it need not be recorded: *Chemical Co. v. Johnson*, 98 N. C. 123; *Milthiser v. Erdman*, 98 N. C. 292.

CONDITIONAL SALE. — A valid sale may be made with a condition retaining title in the vendor until payment of purchase price: *Cooley v. Gillan*, 54 Conn. 80; *Edwards v. Symons*, 65 Mich. 343; provided the transaction is in good faith: *Jenks v. Cohnell*, 66 Mich. 420; 11 Am. St. Rep. 502; and not made to cover up the sale and preserve a secret lien: *New Haven Wire Co. Cases*, 57 Conn. 352.

YOUNGS v. YOUNGS.

[180 ILLINOIS, 280.]

DIVORCE — MORPHINE HABIT NOT HABITUAL DRUNKENNESS. — Proof of habitual intoxication produced by the hypodermic administration of morphine will not sustain a complaint for divorce under the Illinois statute alleging "habitual drunkenness" as a cause of action, for the reason that the words "habitual drunkenness," as used in the statute, mean that state or condition which follows from taking into the body, by drinking or swallowing, excessive quantities of intoxicating liquor.

DIVORCE — CRUELTY — WHAT IS NOT. — In an action for divorce on the ground of cruelty, where the violence complained of was provoked by the complainant's attempts to take morphine from her husband while he was attempting to administer the drug to himself while in a state of partial or total delirium, and his acts consisted mainly in resisting such attempts, the complainant cannot set up the treatment thus received by her as extreme and repeated cruelty within the meaning of the statute.

DIVORCE — CONDONATION OF CRUELTY. — In an action for divorce on the ground of cruelty, where it is shown that the last act of violence to the complainant was committed three months before she ceased to live and cohabit with the defendant, there is such condonation as will bar the complainant's right to relief, in the absence of proof of subsequent conduct on the part of defendant sufficient to do away with such condonation.

C. F. Loesch and George Driggs, for the appellant.

A. J. Hopkins, N. J. Aldrich, and F. H. Thatcher, for the appellee.

BAILLY, J. This was a bill in chancery, brought by Marie A. Youngs against Phineas B. Youngs, her husband, in the circuit court of Cook County, praying for a divorce. The parties were married at Galva, Illinois, February 12, 1879, and shortly thereafter took up their residence at Aurora, Kane County, Illinois, where they resided until about the 1st of March, 1887. One child, a daughter, was born as the fruit of their marriage, who, at the date last mentioned, was about five years of age. On or shortly after March 1, 1887, the complainant left her husband and went to the city of Chicago, where her father and sister were living. On the fourth day of March, 1887, she filed a bill against her husband for a divorce in the circuit court of Cook County, setting up as her only ground of complaint that her husband, for more than two years then last past, had been guilty of habitual drunkenness. On the 11th of April, 1887, the parties executed an instrument in writing, whereby it was agreed that they should live separate and apart for the period of one year from that date, and that during that period the defendant should pay the complainant at the rate of thirty-five dollars per month for the support and maintenance of herself and child, and that the defendant should have the privilege of seeing said child by himself or in the presence of the complainant, as he might prefer, one day each month during the continuance of said contract; that the complainant should immediately dismiss her bill for a divorce, and refrain from commencing any other proceedings of like character during the same period; that the defendant, during that time, would wholly refrain from the use of morphine or liquor in any form, except for medical purposes and under the direction of a skillful and reputable physician.

For the period of one year mentioned in said instrument the parties lived separate and apart, the defendant living in Aurora and the complainant remaining in Chicago, the defendant during that time making to the complainant the monthly payments agreed upon. At the end of the year the defendant ceased to make further payments, and the complainant, on the twelfth day of April, 1888, the day following the termination of the year, filed in the same court a new bill for a divorce.

By said bill, the complainant alleged, as she had in her former bill, that the defendant, for the period of more than two years prior to the time she left him as aforesaid, was guilty of habitual drunkenness, and also alleged generally

that the defendant had been guilty of extreme and repeated cruelty towards the complainant; that is, that he had, on divers days and times since said marriage, beaten and abused her, and neglected to furnish her and her child proper and necessary food and clothing, and was harsh, unkind, and tyrannical in his treatment of the complainant; but no specific acts of cruelty were set out or charged in said bill. The defendant demurred to that portion of the bill charging cruelty, and answered the residue, denying said charge of drunkenness. On the twenty-fifth day of June, 1888, the complainant filed her petition for alimony *pendente lite*, and for an allowance for her solicitor's fees, which petition was denied, and thereupon, on the ninth day of July, 1888, she amended her bill by inserting therein a number of specific charges of cruelty. The defendant answered, denying said charges, and the cause afterwards coming on to be heard by the court on pleadings and proofs, a jury being waived, the issues were found for the defendant, and a decree was entered upon said finding dismissing the bill for want of equity. Said decree was affirmed by the appellate court, and by appeal from the judgment of that court the complainant has brought the record here and assigned errors.

The evidence fails to show that the defendant has ever been in the habit of drinking intoxicating liquors, at least to excess. But it is claimed, and the evidence on behalf of the complainant tends to show, that for several years prior to the time the complainant left him the defendant had been in the habit of using morphine, administered by hypodermic injections in the arm and leg. It appears that the effects of morphine thus administered are very similar and in many respects apparently identical with those produced by the excessive use of intoxicating liquors. This branch of the complainant's case, therefore, must rest upon the proof of the defendant's indulgence in the morphine habit, and must necessarily fail, unless it can be held that the intoxication and stupor produced by the excessive use of morphine is drunkenness within the meaning of the first section of the statute in relation to divorce.

It cannot be doubted, we think, that the word "drunkenness" is used in said statute in its ordinary and popular sense. The primary signification of the word, as given by Webster, is: "The state of being drunken, or overpowered by alcoholic liquor; intoxication; inebriety." In Bouvier's Law Diction-

ary it is defined as, "The condition of a man whose mind is affected by the immediate use of intoxicating drinks." A similar definition is given by Rapalje and Lawrence in their Law Dictionary, viz.: "Disorder of the mind occasioned by the recent use of intoxicating liquor." The supreme judicial court of Massachusetts, in defining the meaning of the word as used in the statutes of that state, say: "There can be no doubt that drunkenness, as it is commonly understood in the community, is the result of the excessive drinking of intoxicating liquors. Such is also the signification given to it by lexicographers. It is ebriety, inebriation, intoxication; all words nearly synonymous, and all expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of such liquors." It was held in that case that evidence of habitual intoxication from the use of chloroform would not sustain a complaint under the Massachusetts statute, charging a person with being a common drunkard: *Commonwealth v. Whitney*, 11 Cush. 477.

That the word is used in our statute in the sense above indicated, and that it cannot be held to include intoxication produced by the hypodermic administration of morphine, seems to be the inevitable conclusion. A further confirmation of this view, if such were necessary, may be derived from the fact that habitual drunkenness for two years was made a ground for divorce by our statute as early as the year 1827, which was many years before the mode of administering morphine by hypodermic injection was known, as we suppose, to even the medical faculty. As originally used, therefore, these words could not have been intended to include intoxication produced by the administration of morphine in this mode; and as the same words have been continued in precisely the same connection in every subsequent revision of our statutes, the conclusion is irresistible that the words are to be understood now in the same sense in which they were originally employed. It is beyond the power of the courts to extend the application of said words to a subject not within the legislative intent. To make an excessive indulgence in the morphine habit a ground for divorce will require further legislative action, as it is clearly not made such by the statute as it now stands.

The complainant's charges of extreme and repeated cruelty remain to be considered. The evidence tending to support those charges is to be found in the testimony of the complain-

ant, corroborated in part by the testimony of her sister and of a domestic in the family. In the defendant's testimony said acts of cruelty are specifically denied. If it be admitted that the preponderance of the evidence is with the complainant, it remains to be seen whether, upon her own showing, she has suffered at the hands of the defendant such extreme and repeated cruelty, within the meaning of the statute, as should entitle her to a divorce.

The testimony of the complainant and her witnesses shows the commission by the defendant of several acts of personal violence to the complainant, which, if unexplained, would, as must probably be conceded, make out a case of cruelty sufficient to entitle the complainant to a decree. But it affirmatively appears that all of said acts of violence were committed while the defendant was under the influence of morphine, and that they were generally brought on by the complainant's attempts to interpose and prevent the defendant's administering to himself that drug. However praiseworthy may have been her efforts to take the morphine out of her husband's possession, or to prevent his using it, she must be deemed to have known and contemplated the natural and probable results of her action, and to have thus voluntarily encountered the violence which ensued. We would not be understood as holding that the intoxication or delirium produced by the voluntary use of morphine can be set up as a justification of tortious acts committed by one under the influence of that drug, any more than can intoxication produced by the use of alcoholic liquors. But if the violence complained of was provoked by the complainant's attempts to take the morphine from her husband while he was in a state of total or partial delirium, and if, as the evidence seems to show, his acts consisted mainly of resistance on his part to such attempts, the complainant cannot set up the treatment received by her under such circumstances as extreme and repeated cruelty within the meaning of the statute.

The evidence tends to show, and is, as we think, sufficient to establish, condonation. The last act of personal violence to the complainant proved took place some time in December, 1886, but the evidence shows that the complainant continued to live and cohabit with the defendant until she left him, about the first of the following March. No subsequent conduct on the part of the defendant is shown which can be held to be sufficient to do away with such condonation, and we think the

chancellor was correct in holding it to be a bar to the complainant's right to relief.

As tending to support her charge of cruelty, the complainant gave some evidence to the effect that while she lived and cohabited with the defendant, she was compelled by him to submit to excessive sexual intercourse. We have duly considered the evidence on that point, and have only to say that, in our opinion, it fails to show such state of facts as would amount in law to cruelty.

The conclusion reached by the chancellor that the complainant is not entitled to relief on the ground of cruelty is very considerably fortified by considerations drawn from the mode in which her complaint in that behalf has been brought forward. She left her husband and went to Chicago about March 1, 1887, and on the fourth day of that month she filed her bill against him for a divorce. At that time the cruelty which she claims to have suffered must have been fresh in her recollection, and it was but reasonable to expect that if she was entitled to a divorce on that ground, she would allege it in her bill. The only ground alleged, however, was habitual drunkenness, no mention whatever of any acts of cruelty being made. In the articles of agreement entered into a few days later, by which they arranged to live separate and apart for a year, it was recited that certain differences had arisen between them, but the only matter of difference in any way hinted at in the instrument related to the use by the defendant of morphine and liquor. At the expiration of the year, the complainant filed a new bill for divorce, alleging habitual drunkenness, as before, but charging cruelty only in general terms, and not in such form as to be available as a ground for relief. It was not until the sufficiency of that portion of her bill had been challenged by demurrer, and after the weakness of her bill had been developed on her motion for an allowance of alimony *pendente lite*, that her bill was so amended as to charge cruelty in such form as to constitute a ground for a divorce. These circumstances furnish ground for a legitimate inference that the charge of cruelty is a mere after-thought, and that it was brought forward only after it had become apparent that the bill could not otherwise be maintained.

We are of the opinion that the decree is in accordance with the evidence, and that no error was committed by the appellate court in affirming it. The judgment of the appellate court will be affirmed.

AS TO THE MEANING OF THE WORDS "HABITUAL DRUNKENNESS," as used in divorce statutes, see *Mahons v. Mahons*, 19 Cal. 626; 81 Am. Dec. 91, and note.

DIVORCE — CRUELTY AS A GROUND FOR DIVORCE DEFINED: Note to *Morris v. Morris*, 73 Am. Dec. 619-631; compare *Nye's Appeal*, 126 Pa. St. 341; 12 Am. St. Rep. 873, and note. A single act of cruelty is not sufficient; *Miller v. Miller*, 72 Tex. 250; *Doolittle v. Doolittle*, 78 Iowa, 691. For instances of acts decided to be cruel and inhuman, see *Doolittle v. Doolittle*, 78 Iowa, 691; *Wachholz v. Wachholz*, 75 Mich. 377; *Taylor v. Taylor*, 73 Mich. 266; and for instances of acts decided not to be cruel and inhuman, see *Peavy v. Peavy*, 76 Iowa, 443; *Edgerton v. Edgerton*, 79 Iowa, 68; *Peck v. Peck*, 66 Mich. 586.

PEOPLE v. CHICAGO GAS TRUST COMPANY.

[180 ILLINOIS, 268.]

CORPORATIONS — POWERS EXPRESSED AND IMPLIED. — Corporations can only exercise such powers as may be conferred either in express terms or by necessary implication, and such implied powers as are presumed to exist to enable them to carry out the express powers granted, and to accomplish the purposes of their creation.

CORPORATIONS. — AN INCIDENTAL POWER IS ONE that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it.

CORPORATIONS — POWER TO ACQUIRE STOCK IN ANOTHER. — Where a charter in express terms confers upon a corporation power to maintain works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist, nor does it exist without legislative authority, although such corporation might take the stock of another corporation in payment or security for a debt.

CORPORATION — POWERS UNDER GENERAL LAW. — The charter of a corporation formed under a general law conferring upon it only the ordinary corporate powers does not consist of the articles of incorporation alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form part of the charter.

CORPORATIONS — ACQUISITION OF STOCK IN ANOTHER CORPORATION — POWER UNDER GENERAL LAW. — The power of a corporation to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in those where it cannot be implied from the powers expressly granted, and in such cases the corporation cannot clothe itself with such power by merely naming it in its articles of incorporation, as the official act of issuing the license and certificate of organization is to a large extent merely ministerial.

CORPORATION — POWER UNDER GENERAL LAW. — Where a corporation is formed under the general law, such law, and not its articles of incorporation, must determine what powers can be exercised as incidents to its business; and when such law expressly restricts the powers of the corporation to such as are necessary and requisite to carry into effect the

object for which it was formed, a corporation organized for the purpose of engaging in the business of making and selling gas cannot purchase stock in other gas companies, as that is not necessary to carry such purpose into effect, and not only is not expressly granted by such act, but is impliedly prohibited thereby.

CORPORATION — POWERS UNDER GENERAL LAW. — Powers obtained by corporations under general laws are necessarily restricted to those mentioned in the act. The charter is void as to all powers and privileges granted beyond the provisions of the statute, and if unauthorized provisions are added to the articles of incorporation, all such provisions, and the acts done pursuant thereto, are void, and such articles must be construed strictly as against the grantee, and in favor of the government or general public.

CORPORATION — POWER TO PURCHASE OR HOLD STOCK IN ANOTHER CORPORATION. — A corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas has no power to purchase and hold or sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation.

CORPORATION — PLEA OF CORPORATE POWER, WHEN INSUFFICIENT. — A plea by a corporation of its power under its charter to buy and hold the stock of another corporation is insufficient, and subject to demurrer, when it only alleges generally that the power in question was among those granted by the charter; the plea must set forth particularly and in detail the facts showing how such corporate power was conferred upon or acquired by the corporation.

CORPORATION. — POWER TO PURCHASE AND HOLD the capital stock of another corporation conferred upon one corporation would include power to acquire all the stock of such other corporation.

CORPORATION CREATING MONOPOLY ILLEGAL. — A corporation organized with the object of purchasing and holding all the shares of the capital stock of any gas company within the state of Illinois is not organized for a lawful purpose, within the meaning of her incorporation laws, and all acts done by it towards the accomplishment of such object are illegal and void.

CORPORATIONS — UNLAWFUL PURPOSE AND ACTS. — The word "unlawful," as applied to corporations within the meaning of a general incorporation law, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or in other words, such acts, powers, and contracts as are *ultra vires*.

CORPORATION CANNOT CREATE MONOPOLY. — The business of making and distributing illuminating gas for the use of a city is a business of a public character, and corporations engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest, in contravention of public policy, and void.

MONOPOLY VOID AS AGAINST PUBLIC POLICY. — Whatever tends to create a monopoly, and to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful.

PUBLIC POLICY. — COURTS MUST REFUSE TO SUSTAIN that which is against the public policy of the state, when such public policy is manifested by the legislative or fundamental law of the state.

CORPORATION CREATING MONOPOLY ILLEGAL. — When a corporation is organized under a general statute, a provision in the declaration of its corporate purposes the necessary effect of which is to create a monopoly is void as against public policy.

QUO WARRANTO against the Chicago Gas Trust Company, issued in the name of the people, and requiring the corporation to answer and show by what right it exercises certain powers and privileges described in the opinion. The defendant interposed several pleas to the information, which were demurred to, and the demurrer overruled. From the judgment overruling the demurrer, and from the final judgment in favor of defendant, this appeal is taken.

George Hunt, attorney-general, and James K. Edsall, for the appellants.

Goudy, Green, and Goudy, for the appellee.

MACRUDER, J. The Chicago Gas Trust Company, appellee herein, was organized under the general incorporation law of this state. The statement filed by the original incorporators with the secretary of state sets forth that the trust company was formed for two objects, or for one object of a twofold character. The object named in the first clause of the second specification of the statement is, in brief, the erection and operation of works in Chicago, and other places in Illinois, for the manufacture, sale, and distribution of gas and electricity. The object named in the second clause of the second specification of the statement is, in brief, "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago, or elsewhere in Illinois.

In this proceeding no attack is made upon the validity of the organization of the Gas Trust Company as a corporation. That it was formed in strict conformity with the requirements of the general incorporation law is not denied by the people. Nor does the state here question the right of the appellee company to acquire and operate works for the manufacture and sale of gas and electricity in pursuance of the object designated in the first clause above mentioned. Hence the controversy arising upon the demurrer to the pleas in this case is not as to the right of appellee to exist as a corporation, nor as

to its right to exercise the first one of the powers sought to be conferred upon it by its charter.

The controversy presented by the record relates solely to the authority of the appellee to carry out the object designated in the second clause above mentioned. It is claimed, on the part of the people, that the charter or articles of association of the Gas Trust Company did not and could not confer upon it the power to "purchase and hold . . . the capital stock" of other gas companies. It is averred in the information, and admitted in eight of the eleven pleas, that appellee has purchased and now holds a majority of the shares of the capital stock of four gas companies, to wit, the Chicago Gas Light and Coke Company, the People's Gas Light and Coke Company, the Equitable Gas Light and Fuel Company, and the Consumers' Gas Company; and it is admitted in three of the pleas that the appellee has purchased and now holds some portion of the capital stock of said four companies.

The information charges that by so purchasing and holding a majority of the shares of the capital stock of each of the four companies the appellee usurps and exercises "powers, liberties, privileges, and franchises not conferred by law." The appellee pleads in justification that the power so to purchase and hold the stock is granted by the terms of its charter.

Can the Chicago Gas Trust Company lawfully purchase and hold the stock of other gas companies?

A distinction is sought to be drawn between "capital stock" and "shares of stock." It is said that "capital stock" means the entire property owned by the corporation, while a share in the stock is the right to partake, according to the amount put into the fund, of the surplus profit obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. It is therefore insisted by the appellant that even if the charter of the appellee can be held to confer the power to purchase and hold the general property or funds of other gas companies, it does not for that reason confer the power to purchase and hold shares of stock in such other companies.

The distinction contended for undoubtedly exists under certain circumstances and for certain purposes, but we think that in the present case the words "the capital stock of any gas company or companies" are broad enough to include shares of stock. In the general incorporation act, under which the

appellee and the Consumers' Gas Company, and the Equitable Gas Light and Fuel Company are all organized, the statement is required to set forth "the name of the proposed corporation, the object for which it is to be formed, its capital stock, the number of shares of which such stock shall consist," etc. The original charter of the Chicago Gas Light and Coke Company provides that "the capital stock of said company shall not exceed three hundred thousand dollars, to be divided into shares of twenty-five dollars," etc. The charter of the People's Gas Light and Coke Company as amended in 1865 also provides that its capital stock may be divided into shares. The terms thus used designate the capital stock of a corporation as that which consists of or may be divided into shares. Hence, for the purposes of the present discussion, "the capital stock of any gas company" may be regarded as the aggregate of all the shares of such stock.

The first, third, and seventh pleas aver that the defendant uses and exercises "the power, liberty, privilege, and franchise of purchasing and holding the capital stock of gas companies in the state of Illinois," and that in such use and exercise thereof "it has purchased and still holds capital stock of the four gas companies," etc., without stating how much capital stock it holds. The demurrer to these pleas might well have been sustained on the ground that they do not answer the information. The information charges that the defendant has purchased and holds a majority of the shares of stock in each of the four companies, while the pleas answer by saying that defendant holds "capital stock," and do not set forth whether the stock so held is a majority or less than a majority of the shares. If it be conceded, however, that the three pleas are not defective for the reason thus specified, they present the question whether appellee can lawfully purchase and hold shares of stock in other gas companies, the number of such shares being less than a majority, and therefore too small to give a controlling interest in such other companies.

There are two views which may be taken of the power to purchase and hold the capital stock of other gas companies as designated in said second clause. Must it be regarded as an original, independent power intended to exist exclusively of and in addition to the power named in the first clause or may it be considered as merely ancillary to the other power of maintaining and operating works for the manufacture and sale of gas? If the latter view be correct, the main object

for which the Gas Trust Company was formed would be that it might itself maintain and operate works for the manufacture and sale of gas, while the purchase of shares of stock in other companies would be merely a subordinate object, incidental only to the main purpose of the corporate formation. An illustration of this idea may be found in the general law of this state in regard to life insurance companies, which makes it lawful for a life insurance company organized in the state to "invest its funds or accumulations in the stocks of the United States, . . . or in such other stocks and securities as may be approved by the auditor." The main object of forming such a company is to engage in the business of life insurance, but the power to invest surplus funds in certain stocks is given as an incident to such business.

Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms, or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation: *Chicago, P., & S. W. R. R. Co. v. Marseilles*, 84 Ill. 643; *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it: *Hood v. New York & N. H. R. R.*, 22 Conn. 1; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9.

Where a charter in express terms confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas-works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company cannot be implied because both companies are engaged in a

similar kind of business": 1 Morawetz on Private Corporations, sec. 431.

It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt, but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas-works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands, but it is questionable whether even these can invest their surplus funds in the stocks of other corporations without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investment; its surplus profits belong to the stockholders, and when distributed among them can be used by them as they see fit.

If, then, the power to purchase outside stocks cannot be implied from the power to operate gas-works and make and sell gas, a company to whom the latter power has been expressly granted cannot exercise the former without legislative authority to do so. This is the law as settled by the great weight of authority.

Boone on the Law of Corporations says: "Without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." In Green's Brice's *Ultra Vires* 91, note b, it is said: "In the United States, a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So, also, Morawetz on Private Corporations, sections 431 and 433, says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. . . . A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools." The authorities referred to by these text-writers sustain the conclusions announced by them. It has been held in many cases that, "in the United States, corporations cannot purchase or hold or deal in the stocks of other corporations, unless expressly authorized to do so by

law," and that "one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute": *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350; 38 Am. Rep. 594; *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 20; *Sumner v. Marcy*, 3 Wood. & M. 105; *Mechanics' etc. Mut. Sav. Bank v. Meriden Agency*, 24 Conn. 159; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah etc. R. R. Co.*, 43 Ga. 13; *Berry v. Gates*, 24 Barb. 199.

The special charters of the Chicago Gas Light and Coke Company, and of the People's Gas Light and Coke Company, which are set out in full in the information, and not called in question in any of the pleas, confer, by express grant, the power to erect gas-works, and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies; upon the latter subject they are silent. It will not be denied that, under the authorities already cited, these two companies cannot buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation act?

The general incorporation act of this state does not, in express terms, confer upon the corporations organized under it the power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place: 1 Morawetz on Private Corporations, sec. 318. The provisions of the law enter into and form a part of the charter. It certainly cannot be true that a corporation formed under the general incorporation act for a purpose other than that of dealing in stocks can exercise the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? We think not. The action of the secretary of state in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial: *Oregon R'y Co. v. Oregonian R'y Co.*, 130 U. S. 1; 4 Am. & Eng. Ency. of Law, tit. Corporations, 192, n. 1. Whether the articles of association, consisting of the statement, the license, the report of the commissioners, the certificate of organization, etc., do or do not confer such rights and powers as are authorized by the law, is a matter for judicial determination. Counsel for appellee say: "We do not claim, of course, that the action of the secretary of state is conclusive and not subject to review by this court," etc.

The question whether or not the power to purchase stock is a lawful purpose under section 1 of the incorporation act, which provides that "corporations may be formed in the manner provided by this act for any lawful purpose," does not arise under this branch of the discussion. It will be pertinent when we come to consider the right to buy and hold stock as an original and independent power, or object of formation. It is not denied by the appellant that the organization of appellee for the purpose of erecting gas-works, and making and selling gas, is an organization for a lawful purpose. Viewing that as the main purpose for which appellee was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stock in other gas companies by merely describing such power in the statement. To hold that they could confer such power by writing it down in the statement would be to hold that the general assembly could clothe them with a part of its legislative functions.

When a corporation is formed under the general incorporation act for the purpose of carrying on a lawful business, the law, and not the statement or the license or the certificate, must determine what powers can be exercised as incidents to such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, section 5 of the general law provides that corporations formed under

it "may own . . . so much . . . personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, . . . and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence it is forbidden to own such stock, the same being "personal estate."

The language of the act, as thus quoted, expressly restricts the powers of a corporation organized under it to such powers as are necessary and requisite to carry into effect the object for which it was formed. We have already seen that where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore the general incorporation act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks.

It has been held that the powers obtained by corporations organized under general laws are necessarily restricted to those mentioned in the act: *Medical Coll. Case*, 3 Whart. 445; that in such cases the charter is void as to all powers and privileges granted beyond the provisions of the statute: *Heck v. McEven*, 12 Lea, 97; that if unauthorized provisions are added to the articles of incorporation, all acts done pursuant to such provisions will be void: *Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 546; that anything in such articles not warranted by the statutes authorizing the formation of corporate bodies is void for want of authority: *Oregon R'y Co. v. Oregonian R'y Co.*, 130 U. S. 1; and that such articles must be construed strictly, and against the grantee, and in favor of the government or the general public: *Oregon R'y Co. v. Oregonian R'y Co.*, 130 U. S. 1.

Our conclusion upon this branch of the case is, that if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies as an

incident to such purpose of its formation, even though such power is specified in its articles of incorporation.

We come now to the second view of the right to purchase and hold the stock of other companies, which is involved in the issue presented by the demurrers to all of the eleven pleas, including the first, third, and seventh.

The eight pleas other than the three last named are bad on demurrer, because they do not set out the defendant's title specially. It is not enough to allege generally that the power or franchise in question was among the powers conferred by the charter; the pleas should set forth particularly and in detail the facts which show how the corporate power or franchise was conferred upon or acquired by the defendant: *Clark v. People*, 15 Ill. 213; *Carrico v. People*, 123 Ill. 198.

But if this technical objection be waived, the eight pleas are demurrable, for reasons which go to the merits. Some of them aver that the charter confers the power to purchase "the capital stock" of other gas companies, which, as hereafter stated, means all the capital stock of such companies. Others of them are less explicit. But all of them aver that the charter granted a power broad enough to authorize the purchase of a majority of the shares of the capital stock of other gas companies, and that, under it, such majority of shares has been purchased. All of them plead the right to so purchase a majority of said shares as an original and independent power or franchise, without reference to the other power of making and selling gas. Hence they fall within the objections hereinafter stated.

The language of the statement, as set out in the first, third, and fourth pleas, imports an intention to create the Chicago Gas Trust Company for two independent objects. The clauses describing these objects are connected by the conjunction "and." Both were designed to be of equal importance, and to be carried out independently of each other. According to the plain meaning of the terms in which they are set forth, neither was to be regarded as secondary or incidental. The first of these objects is stated as follows: "To build, erect, purchase, lease, establish, maintain, enlarge, extend, and operate or demise works in . . . Chicago, . . . and in such other place or places in . . . Illinois as said corporation may, by the vote of the majority of its stockholders, elect, for the manufacture, supply, sale, and distribution of gas and electricity, or either, for the furnishing of light, heat, fuel, and power,"

etc. There is nothing in this record to show that appellee has ever done anything towards the accomplishment of this first object.

The second of the two objects is stated as follows: "And to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good-will, rights, and franchises of any gas-works, or gas company or companies, or any electric company or electric companies, in Chicago, ... or elsewhere in Illinois as said corporation may, by vote of the majority of the stockholders, elect," etc.

Manufacturing and selling gas is one kind of business; dealing in stocks is another and different kind of business. If it appeared that the appellee was engaged in both under its present charter, a serious question might arise as to the power to organize one corporation for two distinct purposes under the general incorporation act of this state. This record, however, only shows that the appellee is exercising the power designated by the declaration of the second object of its formation. What is the power which it is so exercising?

If appellee can "purchase and hold the capital stock" of other gas companies, it can hold all the capital stock of such companies. "The capital stock" does not mean a part, but the whole. We have already seen that "the capital stock," as those words are here used, includes all the shares of stock. This view is strengthened by the use of the words "or purchase or lease or operate the property, plant, good-will, rights, and franchises" of any gas company. If "capital stock" meant nothing but property, the right to purchase property would not be mentioned in separate words. Counsel for appellee say in their brief: "It is a pretty nice distinction to say that the power to buy capital stock of a corporation does not include the power to purchase certain of the shares of that stock." If power to purchase "capital stock" includes the power to purchase "certain of the shares of that stock," then power to purchase "the capital stock" includes the power to purchase all the shares of such stock.

The power sought to be conferred by these articles of association is something more than the mere right of purchasing certain shares of the stock of other gas companies as an investment; an attempt has here been made to vest the Chicago Gas Trust Company with the tremendous power of purchasing and holding all the shares of stock, and purchasing and operating all the property, rights, and franchises of every

gas company, not only in Chicago, but in the state of Illinois. What has been done under the power thus claimed to have been lawfully granted?

There were four gas companies in the city of Chicago, whose names have already been mentioned. One of them, under an old charter of 1849, had the right to lay its mains and pipes in the streets without permission of the city. The other three had permission to do so under ordinances passed by the city council. All of them laid their pipes and mains, and were engaged in making gas and furnishing it to the inhabitants. They were the only gas companies who were so engaged, and who had undertaken to make such use of the public streets. The Chicago Gas Trust Company has purchased and now holds a majority of all the shares of stock of these four companies. It was itself organized with a capital stock of \$25,000,000; the capital stock of the four companies was \$16,984,200. How great a majority of such stock is held by the appellee does not appear from the record. What results must necessarily follow from such ownership of a majority of the shares of stock of these four companies?

One result is, that the Chicago Gas Trust Company can control the four other companies. The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred: *Greenhood on Public Policy*, 5; *Richardson v. Crandall*, 48 N. Y. 348; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666. The sixth section of the general incorporation act provides that the corporate powers shall be exercised by a board of directors or managers, and that the number of such directors or managers, and their terms of office, shall depend upon "the consent of the owners of a majority of the shares of stock." It cannot be denied that the appellee, as owner of the majority of the shares of stock of these four companies, can control them, in the exercise of all their corporate powers, through a board of managers of its own selection. In *Weidenger v. Spruance*, 101 Ill. 278, this court, speaking through Mr. Justice Scholfield, said: "The stockholders elect the directors, and through them carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the stockholders," etc.: *Milbank v. New York etc. R. R. Co.*, 64 How. Pr. 29.

The control of the four companies by the appellee — an outside and independent corporation — suppresses competition

between them, and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas.

The fact, that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

The general incorporation act provides "that corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." The purpose for which a corporation is formed, under the act, must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago, or Illinois, it was not organized for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void.

The word "unlawful," as applied to corporations, is not used exclusively in the sense of *malum in se*, or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or in other words, such acts, powers, and contracts as are *ultra vires*: *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43; 28 Am. Rep. 9; *Oregon R'y Co. v. Oregonian R'y Co.*, 130 U. S. 1.

The business of manufacturing and distributing illuminating gas by means of pipes laid in the streets of a city is a business of a public character; it is the exercise of a franchise belonging to the state; the services rendered and to be rendered for such a grant are of a public nature; companies engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest and in contravention of public policy: *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530; 2 Am. St. Rep. 124; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396.

Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful,

as being contrary to public policy: 2 Addison on Contracts, 743; Greenhood on Public Policy, 180, 643, 654, 655, 670; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; 8 Am. Rep. 159; *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 121; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Haslehurst v. Savannah R. R. Co.*, 43 Ga. 13; *West Virginia Transp. Co. v. Ohio Pipe Line Co.*, 22 W. Va. 600; 46 Am. Rep. 527.

In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 121, where the opinion was delivered by Mr. Justice Craig, we said: "We understand it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal, and void, etc. . . . Whatever is injurious to the interest of the public is void on the ground of public policy." In *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, the supreme court of Ohio said: "Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public."

We are reminded by counsel that the application by the courts of public policy to the law is a usurpation of legislative functions. And undoubtedly some courts have gone so far as to deserve the charge of such usurpation. But it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation or fundamental law of the state: *Santa Clara Female Academy v. Sullivan*, 116 Ill. 375. By chapter 28 of our Revised Statutes, it is provided that "the common law of England, so far as the same is applicable and of a general nature, . . . shall be the rule of decision, and shall be considered of full force until repealed by legislative authority." Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. This principle owes its existence to the very sources from which the common law is supplied: Greenhood on Public Policy, 2, 3.

The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public: *Chappel v. Brockway*, 21 Wend. 159; *West Virginia Transp. Co. v. Ohio Pipe Line Co.*, 22 W. Va. 600; 46 Am. Rep. 527. In *Stanton v. Allen*, 5 Denio, 434, 49

Am. Dec. 282, an agreement whose tendency was to prevent competition was held to be void by the principles of the common law, because it was against public policy and injurious to the interests of the state.

"Contracts creating monopolies are null and void as being contrary to public policy": 2 Addison on Contracts, 743. All grants creating monopolies are made void by the common law: 7 Bac. Abr. 22. In the *Case of the Monopolies*, 6 Coke, part 11, p. 84, it was decided, as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a "grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly, and against the common law; 2. That it is against divers acts of Parliament," etc.: *Bell v. Leggett*, 7 N. Y. 176; *Trist v. Child*, 21 Wall. 441.

If contracts and grants whose tendency is to create monopolies are void at common law, then, where a corporation is organized under a general statute, a provision in the declaration of its corporate purposes the necessary effect of which is the creation of a monopoly will also be void.

Speaking of the articles of association of corporations formed under general laws, the supreme court of the United States says: "We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte*; their formation and execution — what shall be put into them, as well as what shall be left out — do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good. . . . These articles, which necessarily assume, by the sole action of the corporators, enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is, whether they conform to the authority given by statute in regard to corporate organization, it is always to be determined upon just construction of the powers granted therein with a due regard for all the other laws of the state upon that subject. . . . The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws

of the state and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom": *Oregon R'y Co. v. Oregonian R'y Co.*, 130 U. S. 1.

In the Oregon railway case, 130 U. S. 1, a railroad corporation had been organized under a general law of the state of Oregon which contained the following provision: "Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act," and it was declared in the articles of association that the company might exercise the power to lease the railroad. The court there held that the power to lease its road and turn over the use of its franchises to another company was not authorized by the general incorporation act of the state, nor by the course of legislation therein, and that therefore such power could not be conferred by the declaration contained in the articles of association. The leasing of the road, in the absence of statutory authority therefor, was not sanctioned as being a "lawful enterprise" within the meaning of the language above quoted.

The public policy of a state may be indicated by the provisions of its constitution as related to past and present legislation. In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, a gas company had been given in 1835 the exclusive privilege of making and selling gas in New Orleans for some fifty years, and the question was, whether such exclusive privilege was abrogated by the new constitution of 1879, which contained a provision abolishing the monopoly features in all existing charters. The United States supreme court said in that case: "The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges as a means of accomplishing public objects."

We have been referred to more than fifty special charters granted by the legislature of this state, in the years 1853, 1854, 1855, 1857, 1859, 1861, 1865, 1867, and 1869, to gas companies in various cities and towns in the state, each one of which confers the exclusive privilege of laying gas-pipes in the streets for a number of years. But when the constitution of 1870 was adopted, it provided, in section 22 of article 4, that the general assembly should pass no local or special law for "granting to any corporation, association, or individual any special or

exclusive privilege, immunity, or franchise whatever," and in section 1 of article 11, that "no corporation shall be created by special laws, . . . but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

Manifestly, the constitution of 1870 reversed the old policy of granting exclusive privileges to gas companies. After 1870 the public policy of the state was against the granting of exclusive privileges to corporations of any kind. The general incorporation act of 1872 was passed in pursuance of section 1 of article 11. The prohibition of special charters granting exclusive privileges, and the authorization of incorporations under a general law, followed by the passage of such a law, put the people of this state on record as being opposed to the creation of monopolies of all kinds.

But of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but is in contravention of the spirit, if not the letter, of the constitution.

That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly results from the very nature of the power itself. If the privilege of purchasing and holding all the shares of stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was, that any number of corporations might be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after appellee had purchased and become the holder of the majority of shares

of stock of the four companies in Chicago, another corporation had been organized with the same object in view; that is to say, for the purpose of purchasing and holding a majority of the shares of stock of the gas companies in Chicago. There being only four of such companies, what would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence, to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago is to grant to it a privilege which is exclusive in its character. It is making use of the general incorporation law to secure a special "privilege, immunity, or franchise"; it is obtaining a special charter, under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a "lawful purpose."

It may be here stated, as showing the policy of the state to be against the purchase by one gas company of stock in other corporations, that the power to purchase such stock is not granted in any of the more than fifty special charters above named. On the contrary, in each of these charters, the power of the gas company to acquire and hold personal property is limited to such personal estate "as may be necessary and proper for the construction, extension, and usefulness of the works of said company, and for the management and good government of the same."

The power of purchasing and holding the capital stock of the four gas companies in question tends to relieve appellee of a proper share of its legal obligations, and to enable it to carry on a gas business without subjecting itself to the restrictions imposed by the statute. To this extent, the exercise of such power is not lawful.

The successful operation of a gas company in any city requires the use of the public streets for the purpose of laying pipes and mains. Section 1 of article 5 of the general act for the incorporation of cities and villages confers upon the city council the power to regulate the use of the streets, to provide for the lighting of the same, and to regulate the openings therein for the laying of gas pipes and mains, and erecting gas-lights; by the same section it is also provided that any company "organized for the purpose of manufacturing

illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council (subject to existing rights), to erect gas-factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may, by ordinance, impose."

The general act for the formation of corporations, considered with reference to the powers conferred by it upon gas companies organized under it, must be construed in connection with the city incorporation act. The provisions of the latter act as above quoted are to be considered as a part of every charter granted to a gas company under the former act. The charter, or, speaking more accurately, the articles of association, of every such gas company can only be issued or accepted subject to the foregoing provisions. Hence the appellee company could not exercise the power of operating works for the manufacture and sale of gas in Chicago without submitting to such regulations as the common council of the city might, by ordinance, impose; nor could it erect a gas-factory and lay its pipes in the streets without the consent of the common council. It accepted its certificate of organization subject to the condition that it would obtain such consent and submit to such regulations, if it engaged in the business of making and selling gas in that city. As between it and the state, it was bound to fulfill this condition in its capacity as a separate and independent organization, and not as the governing influence in the directories of other organizations.

But it either does, or may, engage in the business of making and selling gas in Chicago without obtaining the consent of the council, and without submitting to the regulations of the city, by operating through the four companies, a majority of whose stock it owns, and whose business it can therefore control. It thus indirectly makes use of privileges granted to the four companies, but never granted directly to itself. The regulations which the common council might have deemed it necessary to make with reference to the use of the streets by appellee may not have been the same as those which the four companies were required to submit to.

But this is not all. By the terms of the provision above quoted, appellee could only obtain the consent of the council to erect gas-factories and lay pipes in the streets of the city "subject to existing rights." What were "existing rights"?

The rights already secured by the four companies to use the streets and alleys, and make and sell gas. But the appellee, through the controlling interest which it owns in the stock of the four companies, can use the streets and make and sell gas, independently of the existing rights of the four companies, and not only so, but it either does or may absorb, combine, and use the rights of said companies, and subordinate them to its own purposes.

In the mode thus indicated, the appellee, in the exercise of the extraordinary power sought to be conferred upon it, may avoid the wholesome restrictions of the law applicable to the circumstances under which gas companies are permitted to use the public streets. By the use of the words "subject to existing rights," in the city incorporation act, the legislature plainly indicated its intention that there should be no combination between gas companies, but that each should separately pursue its business of furnishing gas to the inhabitants. If every new company seeking the consent of the council to its use of the streets for laying gas-pipes is required to accept such consent "subject to existing rights," the companies already existing, and already exercising the rights of using the streets and furnishing light, must be allowed to continue to do so, and to do so independently of the new company, and as separate organizations under their respective charters.

Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain: *Chicago Gas Light and Coke Co. v. People's Gas Light and Coke Co.*, 121 Ill. 530; 2 Am. St. Rep. 124. In *Gibbs v. Baltimore Gas Co.*, 180 U. S. 411, the supreme court of the United States, in an able opinion delivered by Mr. Chief Justice Fuller, uses these words: "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."

The privileges awarded to the four gas companies under their respective charters were given them in return for and in consideration of services to be rendered by them to the public. When they entered the streets of Chicago, they assumed the performance of the public duty of furnishing light to the

inhabitants. That they should be permitted or required or forced to abandon the performance of such public duty is against the policy of the law. The public duty is imposed upon each company separately, and not upon the four when combined together. Each for itself, when it accepted its articles of association, assumed an obligation to perform the objects of its incorporation. But the appellee, through the control which it does or may exercise over the four companies by reason of its ownership of a majority of their stock, renders it impossible for them to discharge their public duties except at the dictation of an outside force, and in the manner prescribed by a corporation operating independently of them. They are thus virtually forced to abandon the performance of their duty to the public. The freedom and effectiveness of their action in carrying out the purposes of their creation are seriously interfered with, if not actually destroyed. A power whose exercise leads to such a result cannot be lawfully intrusted to any corporate body.

We held, in *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, that, for the reasons there stated, a contract between two of these four companies, the effect of which was to stifle competition between them and necessitate an abandonment of their public duties, was against public policy, and could not be enforced. The attempt to consolidate the two companies, by placing the majority of their stock in the hands of the appellee, would accomplish the same unlawful result which was sought to be attained by the forbidden contract.

In ordinances passed by the common council of the city of Chicago granting permission to the other two of the four companies, to wit, the Equitable Gas Light and Fuel Company and the Consumers' Gas Company (or its predecessor), to lay pipes in the streets for the purpose of supplying gas to the inhabitants of the city, it was provided that such permission should not take effect until the two last-named companies had given bond not to "sell, lease, or transfer their franchises and privileges to any other gas company," and not to "enter into any combination with any other company concerning the rate (or price) to be charged for gas." But the Chicago Gas Trust Company, by reason of its ownership of the majority of the shares of stock of the Consumers' company, and the Equitable company, can effect a virtual transfer of their franchises and privileges to itself in spite of the condition imposed

by the ordinance, and in utter disregard of the public interests.

We concur in the following views expressed by the supreme court of Georgia in the case of *Central R. R. Co. v. Collins*, 40 Ga. 582: "All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations professing, and in the main truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed as such bodies are from the sure bound to the schemes of individuals, — the grave, — they are able to add field to field and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life."

We are of the opinion that the court below erred in overruling the demurrers to the pleas.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to sustain the demurrers to the pleas, and for further proceedings in accordance with the views here expressed.

POWERS OF CORPORATIONS. — Corporations cannot do anything not expressly or by necessary implication permitted them by the law of their being: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517; *Beers v. Dallas City*, 16 Or. 334; *People v. Newton*, 112 N. Y. 396; *Rockhold v. Canton etc. Soc.*, 129 Ill. 440; *Chewacka Lime Works v. Dimukes*, 87 Ala. 344; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798.

POWERS OF CORPORATIONS. — In ascertaining the powers of a corporation organized under a general law, the court looks to the certificate of the promoters; but in the case of a corporation organized under a special act, the court looks to the provisions of the special statute: *Rockhold v. Canton etc. Soc.*, 129 Ill. 440.

CORPORATIONS MAY, IN CERTAIN CASES, INVEST IN THE STOCK OF OTHER CORPORATIONS; but whether they may do so with a view to becoming permanent stockholders is not settled: *Hodges v. New England Screw Co.*, 1 R. I. 312; 53 Am. Dec. 624.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

LIME CITY BUILDING, SAVINGS, AND LOAN ASSOCIATION
V. WAGNER.

[122 INDIANA, 78.]

BUILDING ASSOCIATIONS—EXTINGUISHMENT OF LIABILITY OF BORROWER.

—Where, under the by-laws of a building association, a borrower is required to pay dues and installments weekly for the period of six years, and such payment discharges all his obligations to the association, and "all loans shall become due in six years from the date of this corporation, or on the stock of the corporation becoming of par value, in either of which cases the note given by the borrower and the stock upon which the loan was made shall be set off against each other," a borrower who pays his dues and installments as required for six years extinguishes his liability to the association.

PLEADING PRESUMPTION IN AID OF COMPLAINT.—It will not be presumed in aid of a complaint assailed by demurrer that defendant was guilty of a breach of contract for that must be affirmatively alleged by plaintiff as one of the elements of his cause of action.

J. T. Alexander, and J. M. Hatfield, for the appellant.

J. B. Kenner, and J. I. Dille, for the appellees.

ELLIOTT, J. The appellant, an incorporated building, loan fund, and savings association, sues the appellee Frederick Wagner upon three promissory notes executed by him, and charges that he conveyed real estate of which he was the owner, for the purpose of defrauding his creditors. Copies of the notes and of the by-laws of the association are filed with the complaint, and it is alleged that the notes became due by reason of the failure of Wagner, who was a member of the

association and the holder of one share of capital stock, to pay the weekly dues and weekly installments of interest due on the notes. It is provided in each of the notes that, upon the failure to pay such weekly dues and installments for a period of three months the note shall become due, and the by-laws are made part of the notes by reference. Section 5 of the by-laws requires dues and installments to be paid weekly, and section 32 reads as follows: "All loans shall become due in six years from the date of this corporation, or on the stock of the association becoming of par value, in either of which cases the note given by the borrower and the stock upon which the loan was made shall be set off against each other." The association was organized in April, 1879, and this action was begun in January, 1886.

The contract between the borrower and the association makes the by-laws a part of their agreement, and by the terms of section 32 the borrower who pays weekly dues and installments for a period of six years discharges his obligation to the association. The liability of the borrower does not extend beyond that period; for at the expiration of that time the stock extinguishes the note, and it is not an asset in the hands of the corporation: *Barton v. Enterprise etc. Ass'n*, 114 Ind. 226; 5 Am. St. Rep. 608. The theory upon which the parties proceeded in organizing the association, as the by-laws declare it, was, that the borrower who paid the required dues and installments for a period of six years paid the equivalent of the loan which he obtained, and when this was done his obligation was extinguished: *Lister v. Log Cabin etc. Ass'n*, 38 Md. 115; *Cason v. Seldner*, 77 Va. 293; *Hagerman v. Ohio etc. Ass'n*, 25 Ohio St. 186.

This is the only reasonable construction that can be given the by-laws, and it is the only one consistent with the doctrine of the authorities. If it, moreover, the only rule that will prevent gross injustice to the member who borrows money from the association; for, no matter for what length of time he pays dues and installments, he can reap no profit, as his stock simply cancels his obligation. In no event can it do more. If the association can compel its members to pay dues for seven years, it can do so for ten or twenty; and if it could do this, the consequences would be most disastrous to the borrower. To illustrate: Suppose a member to be required to pay weekly dues of twenty-five cents per share of \$150, and to pay interest weekly at the rate of six per cent on a loan equal to the

amount of his stock, he would pay at the end of seven years four dollars in excess of the face value of his stock, and at the end of twelve years \$114 more than the face value of his stock, and yet, if appellant's theory be correct, he could ask no more than that his stock should cancel his debt, no matter how long he should be compelled to pay dues and interest. But it is also to be borne in mind that the association gets the benefit of the weekly dues and installments of interest from the beginning, and not only this, but it has a right to secure a premium upon loans. It is quite evident, therefore, that some limit as to the time a borrower can be compelled to pay weekly dues and interest should be fixed, and it is also evident that the limit of six years imposed by the by-law under examination is not unreasonable. If no limit were fixed, then the members who borrow would be at the mercy of those who do not take loans; but, where a limit is fixed, it binds all the members, and as it is the result of their own voluntary act, they cannot complain if it so operates as to make their profits less than they expected. All members are on an equal footing; for those who do not borrow reap all the profits that accrue beyond the face of their stock, but if loss occurs, they must bear it; on the other hand, the borrower can, at the utmost, get nothing more than the value of his stock, no matter how generous the profits; if, however, loss occurs, he is safe, for at the expiration of the limited time he is discharged from his obligation, although losses may have been sustained which greatly depreciate the stock. If the borrower can secure no profit, he can lose nothing, because his stock cancels his debt.

The complaint charges that the appellee was in arrears for three months, and this means three months before the complaint was filed; and as the time limited by the by-laws had expired nine months before the complaint was filed, it does not show that he was in default. In order to show a right of action it should have been alleged that there was a default before the expiration of the six years fixed by the by-laws as the time for which the members of the association were bound to pay interest and dues.

It cannot be presumed in aid of a complaint assailed by demurrer that a defendant was guilty of a breach of contract, for that must be affirmatively alleged by the plaintiff as one of the elements of his cause of action.

As there is no complaint upon which judgment can be sus-

tained, it is unnecessary to consider any of the other questions argued.

Judgment affirmed.

BUILDING ASSOCIATIONS. — When a member of the association becomes a borrower therefrom, the transaction is so much in the nature of a loan that subsequent payments made by the member upon his stock are partial payments upon his debt: Note to *Robertson v. Homestead Ass'n*, 69 Am. Dec. 162; *Winget v. Quincy Bldg. Ass'n*, 128 Ill. 68. But see *North American Bldg. Ass'n v. Sutton*, 35 Pa. St. 463; 78 Am. Dec. 349, and note.

COLEE v. COLEE.

[122 INDIANA, 100.]

DEEDS — DELIVERY ESSENTIAL TO VALIDITY. — Delivery, or that which is legally its equivalent, is as essential to the validity of a deed as is the signature of the grantor.

DEEDS — EXECUTION INCLUDES DELIVERY. — The finding that a deed was executed includes, as a necessary and essential incident, the delivery of the instrument.

DEEDS — VOLUNTARY CONVEYANCE BY WIFE — PRESUMPTION OF INTENTION. — Where a married woman, for the purpose of putting her land beyond the reach of her husband, signs and acknowledges a deed conveying the land to her children, all of whom, with one exception, are infants, and three of whom, including the adult, assent to the conveyance, whereupon the grantor causes the deed to be recorded, and then takes it into her custody intending to retain possession of it and of the land until her death, these facts constitute *prima facie* a delivery and acceptance of the deed.

DEEDS — VOLUNTARY CONVEYANCE BY PARENT — PRESUMPTION OF INTENTION ARISING FROM RECORDATION. — A voluntary conveyance, absolute in form and beneficial in effect, by a parent, to one who is not *sui juris*, and placing it upon record, although possibly not effectual, without more, as a delivery and acceptance between adults, is deemed to evince an unmistakable intention on the part of the grantor to give the deed effect, and to pass the title to the grantee. The assent of the latter, if nothing further appears, is presumed from the beneficial character of the transaction.

DEEDS — PRESUMPTION ARISING FROM RECORDATION. — The fact that the grantor has possession of a deed after it has been duly recorded, where the statute makes the record admissible as original evidence of the conveyance, is not entitled to much consideration as rebutting the presumption of delivery arising in such case, especially where the grantees are minors and members of the grantor's family.

T. B. Adams and L. T. Michener, for the appellant.

B. F. Love, H. C. Morrison, and A. Major, for the appellees.

MITCHELL, C. J. This was an action by Elizabeth R. Colee against Charles Colee and others to quiet the title to certain

real estate of which the plaintiff alleged she was the owner, and in possession. In one of the paragraphs of the complaint the plaintiff alleged that she signed, acknowledged, and placed upon the record a deed which purported upon its face to convey the real estate described in the complaint to the defendants, who are her children, and are, with one exception, infants under the age of twenty-one years; that by the terms of the deed she reserved to herself a life estate in the land; that the deed was wholly voluntary, and was never delivered otherwise than as above. The court found the facts specially. The only material facts found within the issues are, that the plaintiff, "on the fifth day of January, 1885, executed her deed of conveyance" to the defendants, naming them, as her children, whereby she conveyed to them the real estate in controversy, reserving to herself a life estate therein, without any consideration paid, or expected to be paid. It is also found that the plaintiff, after signing, acknowledging, and causing the deed to be recorded, took it into her possession, intending to retain possession of the deed and the land during her lifetime, and that her purpose in conveying the land to her children was to defeat the collection of a supposed claim in favor of her husband.

The only question involved in this appeal relates to the propriety of the conclusions of law stated by the court. On the appellant's behalf it is contended that the special finding of facts does not support the conclusions of law, because it appears therein that the grantor, after signing, acknowledging, and causing the deed to be recorded, took it into her possession, intending to keep possession of it and the land during her lifetime. Hence it is argued that it appears, from the facts specially found, that the deed never was delivered to or accepted by the grantees.

It is familiar law that, until a deed is delivered, or until something is done which is in law tantamount to delivery, the instrument is ineffectual, and does not convey the title to land. Delivery, or that which is legally its equivalent, is as essential to the validity of a deed as is the signature of the grantor: *Scobey v. Walker*, 114 Ind. 254, and cases cited; *Hockett v. Jones*, 70 Ind. 227; *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319; *Fain v. Smith*, 14 Or. 82; 58 Am. Rep. 281; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291; *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237.

The first fact entered in the special finding is, that the plain-

tiff executed her deed of conveyance to the defendants on a given date.

The finding that a deed was executed includes, as a necessary and essential incident, the delivery of the instrument. This is so because there cannot be an execution of a deed without an actual or constructive delivery: *Patterson v. Underwood*, 29 Ind. 607; *Fisher v. Hamilton*, 48 Ind. 239.

In view of the finding that the plaintiff executed her deed of conveyance to the defendants, the fact of delivery is not open to controversy.

Leaving the above finding out of view for the time being, and it appears from the facts specially found that the appellant, for the purpose of putting the land beyond the reach of her husband, signed and acknowledged a deed in which the land was conveyed to her children, all of whom, with one exception, were infants. Three of the grantees, including the adult, had knowledge of and assented to the conveyance. After the deed was signed and acknowledged the grantor caused it to be recorded, and then took possession of it, intending to retain the deed and the land in her possession until her death. These facts constitute *prima facie* a delivery and acceptance of the deed.

As a general proposition, the making of a voluntary conveyance, absolute in form and beneficial in effect, by a father or mother, to one who is not *sui juris*, and placing it upon record, although possibly not effectual, without more, as a delivery and acceptance between adults, is deemed to evince an unmistakable intention on the part of the grantor to give the deed effect and pass the title to the grantee, the assent of the latter, if nothing further appears, being presumed from the beneficial character of the transaction: *Vaughan v. Godman*, 103 Ind. 499, and cases cited; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68; *Burke v. Adams*, 80 Mo. 504; 50 Am. Rep. 510; *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392; *Parmelee v. Simpson*, 5 Wall. 81.

The presumption is made stronger in favor of the delivery of deeds in cases of voluntary settlements than in ordinary cases of bargain and sale: *Walker v. Walker*, 42 Ill. 311; 89 Am. Dec. 445.

The fact that the grantor took possession of the deed after it was recorded, intending to retain it in her possession during her lifetime, is not of itself sufficient to rebut the presumption of delivery which arose from the making and placing of the

deed upon record. The fact that a grantor has possession of a deed after it has been duly recorded, where the statute makes the record admissible as original evidence of the conveyance, is not entitled to much consideration, especially where the grantees are minors, and members of the grantor's family: *Mitchell v. Ryan*, 8 Ohio St. 377. As was in effect said in the case last cited, very clear proof ought to be made to warrant a court in holding that a man who has signed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with his title: *Tobin v. Bass*, 85 Mo. 654; 55 Am. Rep. 392.

Any view that may be taken of the facts found leads to the conclusion that the law was correctly stated by the court.

The judgment is affirmed, with costs.

DELIVERY OF DEEDS. — Delivery is essential to the validity of a deed: *Note to Stone v. French*, 1 Am. St. Rep. 242, 243; *Moody v. Dryden*, 72 Iowa, 461; *Durand's Appeal*, 116 Pa. St. 93; *Gaston v. City of Portland*, 16 Or. 255; *Price v. Hudson*, 125 Ill. 284; *Schwab v. Rigby*, 38 Minn. 395; *Pennington v. Pennington*, 75 Mich. 600; and delivery may be either actual or constructive: *Standiford v. Standiford*, 97 Mo. 231. A sufficient delivery depends upon the intent of the grantor to pass title, and the assent or acceptance of the grantee: *Standiford v. Standiford*, 97 Mo. 231; *Conlan v. Grace*, 36 Minn. 276; *Stevens v. Stevens*, 150 Mass. 557; *Newell v. Cochran*, 41 Minn. 374; *Wolcut v. Lerdell*, 78 Iowa, 668; *Dikeman v. Arnold*, 71 Mich. 656; *Haskell v. Doty*, 78 Cal. 424; *Nasro v. Ware*, 38 Minn. 443; *Price v. Hudson*, 125 Ill. 284. A deed is presumed to have been delivered when it is in the hands of the grantee: *Griffin v. Griffin*, 125 Ill. 431; *McLennan v. McDonnell*, 78 Cal. 273; *Windom v. Schuppel*, 39 Minn. 35; *Glover v. Thomas*, 75 Tex. 506; *Strough v. Wilder*, 119 N. Y. 530. The assent of an infant grantee will always be presumed: *Standiford v. Standiford*, 97 Mo. 231. The delivery of a deed may be effectuated by the grantor doing something and saying nothing, or by doing nothing and saying something, or by both: *Flint v. Phipps*, 16 Or. 437. A delivery may be sufficient when made, not to the grantee named therein, but to the real beneficiary of the grant: *Holcombe v. Richards*, 38 Minn. 38.

STURGIS v. WORK.

[122 INDIANA, 184.]

WILLS — EXPLAINING AND REFORMING — ELIMINATION OF WORDS AND PHRASES. — The chancery powers of a court cannot be invoked, at the instance of a devisee, to reform a will by eliminating words or phrases and supplying others, so as to make the instrument conform to what may be supposed to have been the real intention of the testator.

WILLS — EVIDENCE ADMISSIBLE TO EXPLAIN, BUT NOT TO SHOW INTENTION. — Extrinsic evidence may be admitted in a proper case, where the effect of it is merely to explain or make certain what the testator has written; but such evidence is never admissible to show what the testator intended to write.

WILL, CONFLICT BETWEEN, AND CODICIL. — Where the terms of a will clearly give an estate, the words of a codicil must manifest an intent equally clear to revoke it; but when the provisions of the codicil thus expressed are repugnant to provisions contained in the will, the codicil is to be regarded as the expression of the testator's final determination upon the subject.

WILLS — CONSTRUCTION — EFFECT OF CODICIL. — Where a clause in a will, in clear and decisive language, gives all the residue of an estate to the testator's two sons, and a later clause or codicil, equally clear and decisive, gives the same subject-matter to all of his children, share and share alike, the codicil must control, as being the final expression of the testator.

WILLS — FAILURE OF DEVISE AS TO ONE — EFFECT AS TO OTHERS. — Where an estate is given by will to two, and the part given to one fails from any cause, that part, without an express and fresh disposition of it, will not go in augmentation of the part given to the other, but will fall into the residue, or go to the next of kin.

WILLS — DEVISE TO ONE DIMINISHED — EFFECT AS TO OTHERS. — Where a tract of land or sum of money is devised in specific proportions to two persons, and the share given to one is afterwards diminished, or entirely revoked, such share or part thereof will not, in the absence of some express words, go to the other.

T. E. Ellison and L. M. Ninde, for the appellants.

P. A. Randall and W. J. Vesey, for the appellees.

MITCHELL, C. J. Robert Work, late of Allen County, died testate on the third day of July, 1886. By his last will and testament, to which, after it was first executed, there were added two codicils, he disposed of all his real and personal estate. One of the subjects of controversy arises out of the eighth clause of the will, by the terms of which the testator devised to his two daughters, Mary F. and Eliza J. Shoaff, an eighty-acre tract of land in De Kalb County, which is described as the "west half of the southwest quarter" of a certain section, township, and range.

The testator never owned the tract described in the will,

but did own and have, as part of his estate, the west half of the northeast quarter of the section, township, and range above mentioned.

The devisees sought to show these facts, as a basis for the inference that the testator must have intended to dispose of the property actually owned by him, and that the description as found in the will must therefore have been the result of inadvertence or mistake. The ruling of the court below was adverse to the devisees upon this point. It is an established rule that the chancery powers of a court cannot be invoked to reform a will by eliminating words or phrases, and supplying others, so as to make the instrument conform to what may be supposed to have been the real intention of the testator: *Funk v. Davis*, 103 Ind. 281; *Judy v. Gilbert*, 77 Ind. 96; 40 Am. Rep. 289; *Sherwood v. Sherwood*, 45 Wis. 357; 30 Am. Rep. 757. The reason is, that an action to reform a written instrument is regarded as essentially an action for specific performance. A devisee is a mere volunteer; the making of a will being a voluntary act, there is therefore no consideration to support the action, as in actions to reform deeds or contracts. "Volunteers under wills have no equity whereon to found a suit for specific performance": Wigram on Wills, 47. Extrinsic evidence may be admitted in a proper case, where the effect of it is merely to explain or make certain what the testator has written, but such evidence is never admissible to show what the testator intended to write. If the testator had devised the land by some general description by which it might have been identified, as, for example, if he had said, "all my land" in a certain section or township, or "the lot purchased by me from A," or "the tract of land occupied by B," and had then added an erroneous particular description, a case would have been presented for the admission of extraneous evidence within the rule which holds where there is a false description, either of the devisee or of the thing devised, if the will nevertheless contains a sufficient general description of the person or thing, it will take effect notwithstanding the erroneous particular description: *Cleveland v. Spilman*, 25 Ind. 95; *Winkley v. Kaims*, 82 N. H. 268; *Allen v. Lyons*, 2 Wash. C. C. 475; 1 Redfield on Wills, 585.

Extrinsic evidence is not admitted in any case with a view of reforming or adding anything to the will, but for the purpose of arriving at the real intent of the testator, by identifying the person or thing generally described, and to remove the am-

biguity resulting from the erroneous particular description: *Daugherty v. Rogers*, 119 Ind. 254.

It is said that courts should assume in every case, whether there be a general description of the land devised or not, that the testator intended to dispose of property of which he was the owner, and that, hence, evidence ought to be admitted to show that a description as contained in the will was a mistake, so as to prevent wrong and injustice. To do this would, however, violate the fundamental principle that a will, in order that it may be regarded as the legal declaration of a man's intention which he wills to be performed after his death, must be in writing, signed and witnessed, and that the intention of the testator is always to be deduced from the words actually written in the will. That which the statute requires to be in writing cannot be supplied by oral testimony. In respect to this point, there was no error in the ruling of the court.

After making various specific devises of real estate, the testator, in the instrument originally signed as his will, disposed of what might remain, in the following language:—

"10. The residue of my real estate not heretofore disposed of I give and devise absolutely in fee-simple to my sons, Wesley I. Work and Robert Carey Work, share and share alike."

By the terms of the second codicil to his will, the testator first revoked a devise of certain real estate made to one of his daughters, and directed that it should constitute a part of the residue of his estate. Certain absolute bequests and devises theretofore made to his wife were also modified and changed, so that in case of her marriage or death the property devised and bequeathed to her was to become a part of the residue of his estate. This codicil closed with the following clause: "I give, devise, and bequeath to all my children, and their issue, share and share alike, all the residue of my estate not herein specifically devised and bequeathed."

A controversy arose over the two clauses of the will last above set out.

Accepting as correct the statement that all rules for the construction of wills are valuable only so far as they aid in ascertaining the testator's intention, the question is, Can it fairly be said that the testator intended both of these residuary clauses to have effect?

The intention of the testator is to be collected from the entire will, and all papers which constitute the testamentary acts, including will and codicils, must be regarded as constituting

the will: Schouler on Wills, sec. 468. All these, no matter when actually written and signed, are to be considered as giving utterance to the testator's intention concerning the disposition of his estate on the day of his death, thereby becoming in fact his last will and testament. We have therefore two clauses of a will, both of which took effect at the same moment, the first of which directed that the residue of the testator's real estate not theretofore disposed of should go to his two sons, share and share alike, while the last clause declared, in language equally unequivocal, that all the residue of his estate not therein specifically devised and bequeathed should go to all his children, share and share alike. While it is true that a codicil is to be so construed as not to interfere with the disposition of property made in the will to any greater extent than is required to give full effect to the codicil, it is also true that if any of the provisions of the codicil are repugnant to provisions contained in the will, the codicil is to be regarded as the expression of the testator's final determination upon the subject.

The general position is well supported that where the terms of the will are clear to give an estate, the words of a codicil must manifest an intent equally clear to revoke it: *Hearle v. Hicks*, 8 Bing. 475; *Quincy v. Rogers*, 9 Cush. 291. It is undoubtedly settled, too, that where an estate is given in one clause, in clear and decisive terms, the estate so given cannot be taken away or cut down by any subsequent clause that is not as clear and decisive as the one in which the estate is given: *Bailey v. Sanger*, 108 Ind. 264; *Bruce v. Bissell*, 119 Ind. 525, 531; 12 Am. St. Rep. 436, and cases cited; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.

Neither of the clauses in question purports to a devise of a particular estate to the persons therein named. Both are residuary in character, and purport to be a description of any undisposed of residue that may be owned by the testator when the will takes effect. "Residue" means all of which no effectual disposition is made by the will, other than the residuary clause."

Formerly, a testator was only permitted to devise the real estate which he actually owned at the time the will was made; but by statute (R. S. 1881, sec. 2567), after-acquired real estate may pass by a will the same as that owned at the time of the execution of the will. Residuary clauses are employed more especially, so far as they relate to real estate, to dispose

of after-acquired property, and to carry lapsed or void devises. Each of the clauses under consideration purports to dispose of all the real estate owned by the testator not theretofore specifically devised. This, of course, meant all the real estate of which he might be the owner at the date of his death which had not been theretofore otherwise disposed of. Both clauses cover the same subject-matter. The first, in clear and decisive language, gives all the residue to the testator's two sons. The last, in language equally clear and decisive, gives the same subject-matter to all of his children, share and share alike.

It should be observed that, substantially, no real estate is devised or disposed of by the codicil in question, except what may be disposed of by the last or residuary clause. The language used in the codicil must therefore be regarded as referring to the real estate specifically disposed of in the will. Both the will and the codicil come into operation and effect together, and together constitute the last will and testament. They cannot be read as though the will spoke as of one date and the codicil of another; except, as we have already seen, in so far as they are repugnant to each other, the codicil must prevail, as being the "later and better thought," and final expression of the testator. In respect to the point here involved, the court gave an erroneous construction to the will. The last clause must control the undisposed of residue.

By the fifth clause of the will the testator devised to his daughter Sarah Ellen Hilligass 150 acres of land, to be taken off the east side of a certain described tract, and by the seventh clause he devised to his son Wesley F. Work, and Elizabeth Work, his daughter, all the remainder of the tract, except the 150 acres theretofore devised to Mrs. Hilligass. By a codicil subsequently executed, the testator modified the fifth clause of his will, so as to reduce the number of acres previously given to Mrs. Hilligass from 150 to 100 acres.

The seventh clause, in which the remainder of the tract, excepting 150 acres as originally devised to Mrs. Hilligass, was devised to Wesley F. Work and his daughter, was in no wise changed.

The question is, whether the 50 acres taken from Mrs. Hilligass by the codicil were carried to Wesley F. and his daughter by force of the seventh clause in the will. A negative answer must be given to this question. The modification of the fifth clause, by taking off 50 acres from the tract originally devised to Mrs. Hilligass, did not, without more, add anything to the

seventh clause, which gave the remainder of the tract, excepting 150 acres, to the parties therein named.

The rule is, that, where an estate is given to two, if the part given to one fail from any cause, that part, without a fresh disposition of it, will not go in augmentation of the part given the other, but will fall into the residue, or go to the next of kin: 2 Jarman on Wills, 368.

Where a tract of land or sum of money is given in specified proportions to two persons, we can discover no principle which would support the conclusion in case the share given one was diminished or entirely revoked, that it would, in the absence of some express words, go to the other. Upon this point the court below fell into an error.

In respect to the other question suggested, involving the disposition of the money arising from the life insurance policy, the conclusion of the court was correct. In so far as the conclusions of law stated by the court are not in accord with the foregoing opinion, the judgment is reversed, with costs, with directions to the court to restate its conclusions of law, and to render judgment in consonance with this opinion.

CONSTRUCTION OF WILLS. — While the cardinal rule in the construction of wills is to carry out the intention of the testator: *Morrison v. Estate of Sessions*, 70 Mich. 297; 14 Am. St. Rep. 500, and note; *Eyer v. Beck*, 70 Mich. 179; still, such intention must appear from the express directions in the will, or be clearly gathered from the provisions thereof: *Clyt v. Moses*, 116 N. Y. 144; *Shadden v. Hembree*, 17 Or. 14; *Taukenhan v. Duns*, 125 Ill. 524; *Larmour v. Rich*, 71 Md. 369. Courts are not at liberty to strike out or insert provisions which give the will an interpretation not warranted by the language used by the testator: *Waters v. Bishop*, 122 Ind. 517. The general rule is, that while parol testimony may be admissible to explain the terms used in a will, such testimony is inadmissible for any other purpose: *Eyer v. Beck*, 70 Mich. 179; *Farnham v. Barker*, 148 Mass. 204; *Taukenhan v. Duns*, 125 Ill. 524; note to *Judy v. Gilbert*, 40 Am. Rep. 292-295; *University v. Tucker*, 31 W. Va. 622; and compare numerous cases cited in note to *Palmer v. Farrell*, 15 Am. St. Rep. 714, 715. Testimony to prove what a testator intended to express is always incompetent: *McCauley v. Buckner*, 87 Ky. 192.

CODICIL, CONSTRUCTION AND EFFECT OF: See note to *Harvey v. Chouteau*, 55 Am. Dec. 127. A will and codicil must be construed as one and the same instrument: *Pate v. French*, 122 Ind. 10; *Gelbke v. Gelbke*, 88 Ala. 427. The dispositions of the will must not be disturbed further than is necessary to give effect to the codicil: *Hard v. Ashley*, 117 N. Y. 606; *Reichard's Appeal*, 116 Pa. St. 232. But where the codicil conflicts with a provision in the will, the codicil takes precedence: *Warner v. Morse*, 149 Mass. 490.

HESS v. LOWREY.

[122 INDIANA, 225.]

SURVIVAL OF ACTION — DEATH OF PARTNER PENDENTE LITE. — An action in form as contracts for damages for an injury to the person will not survive against the personal representatives of a deceased partner. The nature of the damages sued for, and not the nature of its cause, determines whether or not the action survives.

PARTNERSHIP — LIABILITY OF INDIVIDUAL MEMBER FOR FIRM TORTS. — Each partner is the agent of the firm while engaged in the prosecution of the partnership business, and the firm is liable for the torts of each, if committed within the scope of his agency.

PHYSICIANS — MALPRACTICE — SURVIVAL OF ACTION AGAINST PARTNER. — When, during the pendency of an action against two physicians, as partners, for damages caused by negligence and unskillfulness in setting and treating a dislocated shoulder, one of them dies, the action abates as against his personal representative, but may be prosecuted to judgment against the surviving partner.

PHYSICIANS — MALPRACTICE — EVIDENCE OF DECLARATION OF DECEASED PARTNER. — In an action against the surviving member of a firm of physicians for damages for malpractice, the plaintiff may describe the acts and repeat the declarations made to him by the deceased partner while resetting his broken shoulder, and while treating him afterwards for the injury sustained.

PHYSICIANS — MALPRACTICE — EXHIBIT OF INJURED LIMB TO JURY. — In an action against the surviving member of a firm of physicians for damages for malpractice in resetting a shoulder, the plaintiff may exhibit his shoulder to the jury.

PHYSICIANS — MALPRACTICE — EVIDENCE AS TO SKILL. — In an action against the surviving partner of a firm of physicians for malpractice in resetting a dislocated shoulder, evidence that the deceased partner, who set the member, was, prior to and at that time, extensively engaged in the management of farms, is admissible as affecting his skill and knowledge in his profession.

PHYSICIANS — MALPRACTICE — WHEN PERSONAL EXAMINATION MAY BE REFUSED. — In an action against a physician for malpractice, if application is seasonably made, the plaintiff may be required to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the extent, nature, or permanency of injuries; but where the application is not made until after the close of the plaintiff's evidence, and no reason is shown for the delay, it is not error to refuse the order, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured.

EXPERT EVIDENCE — REFERENCE TO MEDICAL BOOKS. — A medical expert may be asked, on cross-examination, whether certain statements read from a book were not made by certain writers on surgery, in order to test the learning of the witness, when the books referred to are approved authorities upon the subjects under investigation.

TRIAL — INSTRUCTIONS NOT INJURIOUS. — An improper instruction, if general, and probably as injurious to one side as the other, will not cause a reversal of the judgment, in the absence of anything to indicate that it was especially applicable to the appellant.

J. H. Mellett, E. H. Bundy, J. Brown, and W. A. Brown, for the appellant.

T. B. Redding, D. W. Chambers, J. S. Hedges, and C. Roehl, for the appellee.

MITCHELL, C. J. This action was originally instituted by Isaac Lowrey against Luther W. and Frank C. Hess, to recover damages for an injury sustained to the person of the plaintiff, alleged to have been caused by the negligent and unskillful manner in which the defendants, who were partners engaged in the practice of medicine and surgery, reset and treated the plaintiff's shoulder, which had been dislocated. Pending the action, Luther W. Hess died, and the case proceeded to judgment against his personal representative and surviving partner jointly. On appeal to this court, the judgment was reversed: *Boor v. Lowrey*, 103 Ind. 468; 53 Am. Rep. 519, and note. On the former appeal, we arrived at the conclusion that, even though the action was in form *ex contractu*, since the principal or only damages sought to be recovered grew out of an injury to the person, the action would not survive against the personal representative of a deceased partner: *Hegerich v. Keddie*, 99 N. Y. 258; 52 Am. Rep. 25; *Ott v. Kaufman*, 68 Md. 56. The nature of the damage sued for, and not the nature of its cause, determines whether or not the action survives: *Cutter v. Hamlen*, 147 Mass. 471; 1 Chitty's Pleading, 101.

The case is here on a second appeal; and the question is now presented, whether or not the action having abated against the estate of the deceased partner, it can be prosecuted to judgment against the survivor.

That each partner is the agent of the firm while engaged in the prosecution of the partnership business, and that the firm is liable for the torts of each, if committed within the scope of his agency, appears to be well settled: *Champlin v. Laytin*, 18 Wend. 407; 31 Am. Dec. 382; *Tucker v. Cole*, 54 Wis. 539; *Fletcher v. Ingram*, 46 Wis. 191; *Taylor v. Jones*, 42 N. H. 25; *Schwabacker v. Riddle*, 84 Ill. 517; Story on Partnership, secs. 107, 166; 1 Bates on Partnership, sec. 461. "It follows, from the principles of agency, coupled with the doctrine that each partner is the agent of the firm for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership": Lindley on

Partnership, 299. Thus in *Hynes v. Erwin*, 23 S. C. 226, 55 Am. Rep. 15, which was an action against two physicians for an injury resulting from the negligent and unskillful setting of a broken arm, it was held that the act of one, within the scope of the partnership business, was the act of each and all, as fully as if each was present participating in all that was done, and that each partner guarantees that the one in charge shall display reasonable care, diligence, and skill, and that the failure of one is the failure of all.

It is contended, however, that if the appellant was liable at all, he was only liable jointly with his deceased partner, and that the action having abated as to the deceased partner, the case falls within the rule that where one or more of the joint plaintiffs or joint defendants dies, the action shall not thereby be abated if the cause of action survives, but if the cause of action is one that does not survive, then the death of either joint plaintiff or joint defendant abates the whole action: *Meek v. Ruffner*, 2 Blackf. 23; *Williams v. Kent*, 15 Wend. 360.

The general rule established by the cases is, that, where several persons jointly commit a tort for which an action in form *ex delicto* may be maintained, without reference to any contract relation between the parties, the plaintiff has his election to sue all or any one of those engaged in the wrongful act, even though the existence of a contract may have been the occasion or furnished the opportunity to commit the act complained of. But where the action is founded on a joint contract, and is, in substance, whatever its form may be, to recover damages for a breach of the contract upon which the action is predicated, all those jointly liable must be sued, in case all are alive and within the jurisdiction of the court: *Low v. Mumford*, 14 Johns. 426; 7 Am. Dec. 469; *Weall v. King*, 12 East, 452; *Whittaker v. Collins*, 34 Minn. 299; 57 Am. Rep. 55; 1 Lindley on Partnership, 482; Bishop on Non-contract Law, sec. 521; Chitty's Pleading, 469. In a case like the present, where the *gravamen* of the action is the breach of a contract, by the terms of which two persons undertook, as partners, to reset the plaintiff's shoulder, and to treat him with the skill and diligence ordinarily displayed by competent surgeons, and the action is not maintainable without referring to the contract, it may well be, even though the action be laid in tort, that the non-joinder of one of them would be ground for a plea in abatement: Collyer on Part-

nership, sec. 732; Dicey on Parties, 455. But a plea in abatement for non-joinder of parties must, in order to be good, show that the person alleged to be jointly liable, and not sued, is living and subject to the process of the court: *Dillon v. State Bank*, 6 Blackf. 5; *Wilson v. State*, 6 Blackf. 212; *Bragg v. Wetzel*, 5 Blackf. 95; *Levi v. Haverstick*, 51 Ind. 236; *Ferguson v. State*, 90 Ind. 38; Collyer on Partnership, sec. 741; *Merriman v. Barker*, 121 Ind. 74. If, in an action against partners to recover damages for a personal injury growing out of the breach of a contract, it is necessary, as in ordinary actions *ex contractu*, to join all the partners, it must follow that upon the death of one, notwithstanding the action may abate as to the deceased partner, the rule applicable to ordinary actions upon contracts against partners must obtain. At the common law the contract of partners was always treated as a joint agreement, but the firm creditors could not proceed against the estate of a deceased partner, because the death of one of the partners extinguished the contract as to him, leaving it in force as the separate engagement of the survivor. The legal remedy of the creditor was thereafter confined exclusively to the surviving partner, except as the common law was modified by statutes, or by the principles of equity: *Sherman v. Kreul*, 42 Wis. 33.

The right to sue for claims due the firm, as well as the liability to be sued for claims against the firm, devolves exclusively upon the surviving partner: *Meek v. Ruffner*, 2 Blackf. 23; *McLain v. Carson*, 4 Ark. 164; 37 Am. Dec. 777; *Childs v. Hyde*, 10 Iowa, 294; 77 Am. Dec. 113; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; 2 Lindley on Partnership, 665.

Upon the death of one partner, the creditor has a right to collect his claim, at law, from the survivor; or if the cause of action survives against the personal representative, to proceed in the manner pointed out by the statute against the estate of the deceased partner: *Ralston v. Moore*, 105 Ind. 243; *Kimball v. Whitney*, 15 Ind. 280; *Gere v. Clarke*, 6 Hill, 350.

If a partner dies pending an action against the firm, the death being suggested on the record, the action does not abate, but may proceed to judgment against the surviving partner, unless the cause of action dies, not only as against the personal representative of the deceased partner, but as against the surviving partner also: *Williams v. Kent*, 15 Wend. 360; Collyer on Partnership, sec. 727; Pomeroy's Remedial Rights, secs. 250, 251; Bates on Partnership, sec. 1055. When

the damages sued for arise out of an injury to the person of the plaintiff, the cause of action dies with the person of either party; but the cause of action dies only so far as it affects the liability of the decedent or his personal representative. Neither by the common law nor under the statute does the cause of action die as to a surviving partner or defendant, who, as we have seen, remains liable for all claims against the firm: *King v. Bell*, 18 Neb. 409; 8 Wait's Actions and Defenses, 502.

While the members of the firm were all alive, each was liable *in solido* as principal, the firm being, in law, a single entity; upon the death of one partner, his liability was extinguished, but the surviving partner, as the sole representative of the firm, continued liable: *Shale v. Schantz*, 35 Hun, 622.

It is only where the cause of action does not survive in favor of or against either of the joint plaintiffs or defendants that the death of one abates the whole action.

If the action is, as doubtless it should be, regarded as a suit *quasi ex contractu* for damages for an injury to the person, occasioned by the breach of a joint contract, the death of one of the defendants simply severed the joint liability, and extinguished the claim against the decedent, while it continued in full force as to the survivor. If the action is regarded as purely in tort, as where the injury was willful and intentional, then the liability of the defendants may be joint and several, and the death of one does not abate the action as to the other: Collyer on Partnership, 6th ed., 1079, note. The death of one partner in no wise affects the liability of the survivor, who, upon the happening of that event, becomes individually liable to make good the joint undertaking of both.

Ordinarily, in actions *ex delicto*, where the liability arises from the misconduct or wrongful act of the parties, each is liable for all the consequences, and there is no right to enforce contribution; but this rule does not apply between partners unless the liability resulted from a meditated or willful wrong intentionally inflicted by the one seeking to enforce contribution: *Armstrong Co. v. Clarion Co.*, 66 Pa. St. 218; 5 Am. Rep. 368; *Pearson v. Skelton*, 1 Mees. & W. 504; *Jacobs v. Pollard*, 10 Cush. 287; 57 Am. Dec. 105; *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Bailey v. Bussing*, 28 Conn. 455; 4 Am. & Eng. Ency. of Law, 12, 13; Lindley on Partnership, 771.

That the cause of action died as to Luther W. Hess does not at all affect the question of the right of contribution between the survivor and his personal representative. The right of contribution grows out of the partnership relation, and rests upon the implied obligation of each partner to contribute in proportion to the liquidation of all partnership liabilities, unless the liability arose out of an intentional tort committed by the partner asking contribution. That the right of contribution exists affords a persuasive reason for holding that the action may be maintained against the surviving partner.

From every point of view the conclusion follows that the cause of action did not die as to both partners because one member of the firm died, and that the proceeding to judgment against the survivor was not of itself erroneous.

The court permitted the plaintiff to testify as a witness in his own behalf, as a matter of right, and to describe the acts and repeat declarations made to him by Luther W. Hess, deceased, while engaged in resetting his shoulder, and while treating him afterwards for the injury sustained. It is insisted that this testimony was improperly admitted, because the declarations were not made in the presence of the defendant, and for the further reason that the testimony falls within the prohibition of section 498, Revised Statutes of 1881. The declarations were made by a partner while engaged in the business of the firm, and they were therefore admissible on the ground that the law implies an agency on the part of each partner to bind the firm in respect to transactions pertaining to the business of the firm when the declarations are made during the progress of the partnership business to which they pertain: *Boor v. Lowrey*, 103 Ind. 468; 53 Am. Rep. 519; *Williams v. Lewis*, 115 Ind. 45; 7 Am. St. Rep. 403, and cases cited. After some hesitation we have concluded that the testimony does not fall within the prohibition of the statute: *Durham v. Shannon*, 116 Ind. 403; 9 Am. St. Rep. 860.

As we have already seen, upon the death of Luther W. Hess, the plaintiff's cause of action died,—became extinguished as to the decedent. The only cause of action remaining was that which existed against the appellant, and while the transaction with the decedent is incidentally involved, his estate is not concluded by the judgment in the present case. Even though the appellant may be entitled to enforce contribution from the estate, that right cannot be regarded as settled by this judgment.

It was not error to permit the plaintiff below to exhibit his shoulder to the jury. The jury were, after seeing the condition it was in, better able to apply the evidence of the witnesses. It is settled by the decisions of this court that evidence such as that complained of is admissible: *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville etc. R'y Co. v. Wood*, 118 Ind. 544, and cases cited; *Hart v. State*, 15 Tex. App. 202; 49 Am. Rep. 188.

It appeared at the trial that the plaintiff's shoulder had been reduced, or reset, principally by Dr. Luther W. Hess, the father of appellant. For the purpose of affecting the knowledge and skill of the surgeon who set the shoulder, the court permitted the plaintiff to prove, by the cross-examination of the appellant, that his father was extensively engaged in farming at and prior to the time of the injury, and that he devoted a considerable share of his time to the management of several farms. The appellant complains that this evidence tended to prove that Dr. Hess was wealthy, and that it was therefore incompetent, as tending to incline the jury to give enhanced damages.

The evidence was not admitted for the purpose of showing the relative pecuniary condition of the parties. It would have been clearly incompetent for any such purpose. It was, however, entirely competent, as tending to show that one who undertook to perform professional services requiring peculiar skill and knowledge, as well as constant study and close application, was devoting himself principally to some other avocation.

After the plaintiff had closed his evidence in chief, and while the appellant was examining a medical expert as a witness, he asked the court to order the plaintiff below to submit to a private examination by the appellant's medical experts. The court refused to make the order, the plaintiff having offered to submit to an examination in the presence of the jury, or to a private examination on the next morning, or as soon as he could secure the presence of his own expert witnesses.

It is undoubtedly true that the court may, in its discretion, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary, to ascertain the nature, extent, and permanency of injuries; but where the application is not made until after the close of the plain-

tiff's evidence, and no reason is shown for the delay in making the application, it will not be error to refuse the order, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured: *White v. Milwaukee City R'y Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Miami etc. Turnpike Co. v. Bailey*, 37 Ohio St. 104; *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Shepard v. Missouri Pac. R'y Co.*, 85 Mo. 629; 55 Am. Rep. 390; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659; 10 Am. & Eng. R. R. Cas. 783; Thompson on Trials, sec. 859.

Complaint is also made that the court erred in admitting in evidence extracts from certain books or treatises on surgery. It does not appear that extracts from the books were read in evidence, or admitted in evidence as such.

In the cross-examination of a medical expert, the witness was asked whether certain statements were not made by certain writers on surgery, the statement referred to being read from a book held by counsel as part of the question. It is recognized as a proper method of cross-examination, in order to test the learning of a witness, who testifies as an expert, to refer to books of approved authority upon the subjects under investigation: *City of Ripon v. Bittel*, 80 Wis. 614; *Connecticut Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516; *Pinney v. Cahill*, 48 Mich. 584; *State v. Wood*, 53 N. H. 484; Rogers on Expert Testimony, secs. 181, 182.

The opinion of a witness may be tested by a cross-examining counsel by reading from medical books: 2 Best on Evidence, 882-884. Medical books may be read to the jury, not for the purpose of proving the substantial facts therein stated, but to discredit the testimony of experts who refer to books as authority for or in support of their opinions: *Pinney v. Cahill*, 48 Mich. 584.

Among other things, the court charged the jury that "the credit and weight that should be attached to the testimony of a witness depends upon his . . . disinterestedness in the result of the suit, and his freedom from bias or prejudice. Wherever a witness is lacking in any of these respects, it tends, in a greater or less degree, to weaken the force of his testimony."

This instruction borders upon the very edge of propriety, and while it applies alike to the testimony of both parties, both having testified as witnesses, yet if it had been pointed

out to us, or if we could discover that there was any serious conflict between the testimony of the appellant and any other witness, on any material point, we should feel constrained to reverse the judgment. Instructions such as the one in question have so often been the subject of animadversion, that courts should not put their judgments in jeopardy by putting such charges in the record: *Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 68, 82; *Dodd v. Moore*, 91 Ind. 522; *Woollen v. Whitacre*, 91 Ind. 502; *Kline v. Lindsey*, 110 Ind. 837, and cases cited. Without in any wise approving the instruction, since it was general, and may have been as injurious to one side as the other, we cannot reverse the judgment, in the absence of anything to indicate that it was especially applicable to the appellant.

Some of the other instructions are subjected to criticism. We have considered the objections urged, and do not find them objectionable.

The judgment is affirmed, with costs.

ABATEMENT OF ACTIONS BY DEATH of defendant: Note to *Boyr v. Lowrey*, 53 Am. Rep. 525-530.

PARTNERSHIP — PHYSICIANS. — All the members of a firm of physicians are liable for the malpractice of any one of them: *Whittaker v. Collins*, 34 Minn. 239; 57 Am. Rep. 55; note to *Hynes v. Erwin*, 55 Am. Rep. 18, 19.

EXAMINATION OF ONE'S PERSON. — As to when, and when not, the court may compel a party to submit to an examination of his person: *Stidham v. Wabash etc. R'y Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and note 554-557; *Kern v. Bridwell*, 119 Ind. 226; 12 Am. St. Rep. 409, and note; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719; 14 Am. St. Rep. 189, and note; *Anonymous*, 89 Ala. 291; 18 Am. St. Rep.

EXPERT TESTIMONY AS TO MEDICAL QUESTIONS, GENERALLY: See note to *Hammond v. Woodman*, 66 Am. Dec. 224-230.

GASKELL v. VIKESNEY.

[123 INDIANA, 264.]

MORTGAGES—MORTGAGEE, WHEN NOT CHARGEABLE WITH RENTS AND PROFITS.

—To charge a mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with such rents and profits.

MORTGAGES—PURCHASER AT FORECLOSURE, WHEN NOT LIABLE TO JUNIOR MORTGAGEE FOR RENTS AND PROFITS. — A purchaser at a foreclosure sale who afterwards becomes the owner of the mortgaged premises by conveyance from the assignee in bankruptcy of the mortgagor is not liable for the rents and profits to a junior mortgagee not made a party to the foreclosure proceedings.**MORTGAGES—RENTS AND PROFITS—EVIDENCE.** — In an action by a junior mortgagee, not made a party to a foreclosure, to recover the rents and profits of the mortgaged premises from the purchaser at a foreclosure sale, the deed executed by the assignee of the mortgagor in bankruptcy to such purchaser is admissible in evidence to show his possession as owner, and not as mortgagee, and in such action evidence of the value of the rents and profits of the premises is not admissible.**MORTGAGES—REDEMPTION—RIGHTS OF JUNIOR MORTGAGEE.** — Where a junior mortgagee desires to redeem from a sale on a senior mortgage, he may do so, where he was not made a party to the foreclosure suit, without paying the costs of such suit.**MORTGAGES—REDEMPTION BY JUNIOR MORTGAGEE—INTEREST.** — A junior mortgagee seeking to redeem should be compelled to pay the same rate of interest to the date of redemption as that drawn by senior liens.

L. A. Barnett, for the appellant.

G. C. Harvey and L. M. Campbell, for the appellees.

COFFEY, J. On the thirtieth day of August, 1876, Jules A. Viquesney and wife executed to George W. Robinson a mortgage on real estate in Danville, Hendricks County, Indiana, to secure the payment of a promissory note for the sum of \$1,446.76, which mortgage was duly recorded. Prior to said date, the said Jules A. Viquesney had executed two other mortgages upon the same real estate, one to Enion Singer and another to Tracy and Bingham, the last named being the senior mortgage on said real estate.

The mortgage executed to Singer was foreclosed in the Hendricks circuit court, and the property therein described bid in by John N. Shirley and William N. Crabb for the sum of \$973.93, and on the twenty-eighth day of May, 1878, they received a sheriff's deed therefor. George W. Robinson was not made a party to the suit to foreclose this mortgage.

The appellant subsequently became, and now is, the owner

of the note and mortgage executed to the said Robinson, and now prosecutes this suit for the purpose of being allowed to redeem from the sale on the Singer mortgage, and to charge the said Shirley and Crabb with the rents and profits of said real estate during the time they have held and been in possession of the same. Crabb has conveyed his interest in the property to Shirley. The appellee Shirley answered:—

1. That he was the owner in fee of the land described in the complaint, having purchased the same of Thomas J. Cofer, assignee in bankruptcy of the said Jules A. Viquesney, on the twentieth day of June, 1877, and having received a deed therefor from said Cofer as such assignee, the said Viquesney having previously been adjudged a bankrupt by the United States district court for the state of Indiana; that he also held title to said real estate under a sheriff's deed therefor, executed by the sheriff of Hendricks County on the twenty-eighth day of May, 1878, which deed was executed to him on a sale of said premises by the sheriff of said county in the foreclosure proceeding, set out in the complaint, on the Singer mortgage; and that the mortgage executed to the said George W. Robinson, which the appellant is now seeking to foreclose, was executed without any consideration, and for the purpose of cheating, hindering, and delaying the creditors of the said Viquesney.

The second paragraph avers that the mortgage in suit was given as an indemnity, and that said Robinson had never been damaged, or compelled to pay the debt against which the mortgage was given to secure him.

3. In the third answer to so much of the complaint as demands and requires him to account for the rents and profits of the real estate described in the complaint, he averred that he was the owner in fee of the real estate described in the complaint, by virtue of a judicial sale made of the same by order of the district court of the United States for the district of the state of Indiana, on the twentieth day of June, 1877, by one Thomas J. Cofer, who was the assignee in bankruptcy of the said Jules A. Viquesney, the said Viquesney having, prior thereto, been duly adjudged a bankrupt by said court, upon proper petition; that the said Cofer executed to him a deed for said real estate, which was duly confirmed by said district court; that he is also the owner of said real estate, and holds title thereto by virtue of a sheriff's deed, executed to him by the sheriff of Hendricks County, Indiana, on the twenty-eighth day of May, 1878, pursuant to a sale of said real estate, in the

foreclosure proceedings on the Singer mortgage, set up in the complaint.

This answer also sets up the mortgage executed by Viquesney to Tracy and Bingham; alleges the foreclosure of the same in the district court of the United States for the district of Indiana; and the payment of the sum of \$1,265.74 by the appellee in satisfaction thereof to protect his title.

The appellee Shirley also filed a cross-complaint, in which he set up the amount paid at the sheriff's sale on the Singer mortgage, and the amount paid to discharge the Tracy and Bingham mortgage and decree, and asked to be allowed therefor in the event a decree was entered permitting the appellant to redeem.

The court overruled a demurrer to this answer, and the appellant excepted.

Upon issues formed, the cause was tried by the court, who entered a finding and decree that the appellant was entitled to redeem the property covered by the Robinson mortgage, upon payment to the appellee Shirley of the sum of \$3,992.

The appellant filed a motion for a new trial, which was overruled, and she excepted.

The errors assigned are: 1. That the court erred in overruling the appellant's demurrer to the first and second paragraphs of the answer of the appellee Shirley; 2. That the court erred in overruling the appellant's demurrer to the third paragraph of the answer of Shirley; 3. That the court erred in overruling the appellant's motion for a new trial.

As the appellant does not discuss the first assignment of error, the same may be regarded as waived.

The first objection urged against the third paragraph of the answer is, that it attempts to answer the whole complaint, and that it can, at most, amount to an answer to so much of the complaint as seeks to require the appellee Shirley to account for rents and profits. Counsel is in error in assuming that the answer attempts to answer the whole complaint. It is addressed to so much of the complaint only, as we understand the plea, as seeks to charge the appellee with the rents and profits of the mortgaged premises during the time he occupied them. The question is therefore presented as to whether the answer contains facts sufficient to bar the appellant's claim for rents and profits of the mortgaged premises.

It is believed to be the universal rule, in all cases where

the mortgagee takes and retains possession of the mortgaged premises under his mortgage, that he must account for the rents and profits received by him from the premises while he holds the same under his mortgage: 2 Jones on Mortgages, 4th ed., sec. 1114; *Troost v. Davis*, 31 Ind. 34; *Hannon v. Hilliard*, 83 Ind. 362; *Arnold v. Cord*, 16 Ind. 177; *Taylor v. Conner*, 7 Ind. 115.

Such rule, in the absence of some statute upon the subject, rests upon the reasonable doctrine that while the mortgagee is the holder of the legal title to the mortgaged premises, he holds such title, nevertheless, subject to the equitable right of the mortgagor to pay the debt, and thus destroy or put an end to his legal title; and that the mortgagee is entitled to no more than his debt, which the mortgage was intended to secure. Hence it is that when the mortgagor desires to redeem from a mortgagee who has been in the possession of the mortgaged premises under his mortgage, he has the right, in a court of equity, to call upon the mortgagee to account for the amount received by way of rents and profits, for the purpose of determining how much, if anything, is required in order to discharge the mortgage debt.

This doctrine extends to cases where there has been an attempt to sell the premises under the mortgage, where such sale is defective, and does not divest the title of the mortgagor: *Hannon v. Hilliard*, 83 Ind. 362.

This right to compel an accounting for rents and profits extends also to a junior encumbrancer. He may compel a senior mortgagee, who has been in possession under his mortgage, to account, to the same extent and in the same manner as the mortgagor might compel an accounting. His right to compel such an accounting does not rest upon any obligation of the senior mortgagee to him, for there is no contract between them; but it rests upon the fact that the senior mortgagee is under obligation to the mortgagor to account, and that by reason of his junior lien he has the right, in equity, to stand in the place of the mortgagor, and compel the application of the rents and profits to the satisfaction of the senior mortgage.

The junior mortgagee has no right, therefore, to compel an accounting where the mortgagor has no such right, for it is through the mortgagor, and the equity existing between him and the senior mortgagee, that he is enabled to compel an

application of the rents and profits to the satisfaction of the senior mortgage.

For these reasons, it is well settled that, in order to charge a mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with the rents and profits of the mortgaged premises: 2 Jones on Mortgages, 4th ed., secs. 1114-1120; *Daniel v. Coker*, 70 Ala. 260; *Hart v. Chase*, 46 Conn. 207; *Van Duyn v. Shann*, 41 N. J. Eq. 312; *Catterlin v. Armstrong*, 79 Ind. 514; *Catterlin v. Armstrong*, 101 Ind. 258; *Johnson v. Hosford*, 110 Ind. 572; *Renard v. Brown*, 7 Neb. 449.

In the case of *Catterlin v. Armstrong*, 79 Ind. 514, it was said by this court that "a purchaser at a foreclosure sale, defective because a junior mortgagee was not made a party, upon a subsequent redemption by the latter, must account for the rents and profits, if such sale operates merely as an assignment of the first mortgage. But if the sale operates not only as an assignment of a prior mortgage, but as a foreclosure of the equity of redemption, subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for rents or profits."

It follows from what we have said, and from the authorities above cited, that the third paragraph of the answer of the appellee Shirley was sufficient to bar the appellant's complaint in so far as it sought to compel the former to account for the rents and profits of the mortgaged premises. It discloses the fact that the title of the mortgagor, Viquesney, had been divested and vested in the appellee Shirley. As Shirley held in the capacity of owner of the premises, and not as mortgagee, he was not liable to account for rents and profits.

The case of *Murdock v. Ford*, 17 Ind. 52, is in seeming conflict with the later case of *Catterlin v. Armstrong*, 79 Ind. 514.

In so far as it seems to hold that a purchaser at a foreclosure sale, which divests the title of the mortgagor, is liable for rents and profits to a junior mortgagee, the same is disapproved.

The court did not err in refusing to permit the appellant to prove the value of the rents and profits of the mortgaged prem-

ises, as it was admitted on the trial that the title of the mortgagor had been extinguished before the appellee Shirley took possession. The assignment in bankruptcy divested his title, and vested it in the assignee, who by his deed vested it in Shirley. Nor do we think the court erred in admitting in evidence the deed executed by the assignee in bankruptcy to Shirley. It tended to support the allegations in the appellee's answer, and to prove that Shirley was in possession as owner, and not as mortgagee.

It is earnestly insisted, however, that the circuit court erred in fixing the amount to be paid by the appellant in order to redeem. It is insisted that, in ascertaining the amount to be paid, the court not only allowed the amount due on the Singer mortgage and the Tracy and Bingham mortgage, but that it allowed, also, the costs made in the foreclosure of both of said mortgages.

It seems to be too well settled to admit of controversy that where a junior mortgagee desires to redeem from a sale on a senior mortgage, he may do so, where he was not made a party to the foreclosure suit, without paying the costs of such suit.

Where he is not made a party, the foreclosure is, as to him, a mere nullity. He is only required to pay the mortgage debt, with interest: *McKernan v. Neff*, 43 Ind. 503; *Hasselman v. McKernan*, 50 Ind. 441; *Hosford v. Johnson*, 74 Ind. 479; *Shirk v. Andrews*, 92 Ind. 509; *Curtis v. Gooding*, 99 Ind. 45; *Daugherty v. Deardorf*, 107 Ind. 527; *Nesbit v. Hanway*, 87 Ind. 400.

There is no allegation in the complaint in this case as to the amount due on the Singer mortgage, nor is there any allegation as to the amount due on the mortgage executed to Tracy and Bingham.

It is somewhat difficult to ascertain from the evidence in the record the exact amount due on these senior liens. As the appellant desired to redeem by the payment of a sum less than the face of these claims, it was her duty to exhibit to the court trying the cause the exact state of the accounts. However, it is sufficient to say in this case that it does not appear on the face of the record before us that the costs of foreclosing these senior liens are included in the amount which the court adjudged against the appellant as the amount necessary to be paid for the redemption of the mortgaged premises. As these senior liens drew interest at the rate of ten per cent

per annum, it was proper to count interest at that rate to the date of the trial.

We find no error in the record.

Judgment affirmed.

THE CASE of *Watts v. Julian*, 122 Ind. 124, was commenced by Julian against I. P. Watts, Ann E. Watts, C. W. Diggs, J. R. Jackson, guardian of James Moorman, an insane person, and James Moorman, to redeem certain real estate, and to have a sheriff's deed of the same declared null and void, and set aside. The complaint alleged that in January, 1874, one Harpers bought of one Macy the land in dispute, and executed to him a mortgage thereon to secure the payment of three promissory notes, all of which were paid by Harpers except the last, which, together with the mortgage, was assigned to C. W. Diggs. Harpers then, on November 23, 1874, conveyed the land to I. P. Watts, subject to said mortgage, and the latter conveyed, on December 1, 1874, the south half of the land to Julian, Bradbury, and Julian, but retained the north half of the land himself. On March 17, 1876, Bradbury conveyed his interest to Julian and Julian. On January 15, 1877, C. W. Diggs brought suit to foreclose his mortgage, making Harpers and wife, Watts and wife, J. B. Julian and wife, and others, parties defendant, but did not make the plaintiff, Julian, a party, though he was entitled to an undivided one half of the south one half of the land.

Without notice to plaintiff, Diggs foreclosed on the whole of the land, the decree directing that the north half thereof be first sold to satisfy the judgment. On April 17, 1877, the whole of the land was sold to Diggs at foreclosure sale, and he afterwards received his sheriff's deed therefor, and on May 24, 1881, conveyed the whole to James Moorman, who still owns the same. The complaint further averred that the north half of the land was of sufficient value to pay the whole of the mortgage; that J. R. Jackson is the guardian of James Moorman, an insane person; that the foreclosure proceedings by Diggs were binding on all the parties thereto; and prayed an accounting against Diggs and Moorman, that the amount required to redeem might be ascertained, and a decree rendered ordering the sale of the north half of the land to pay the sum necessary to redeem. The complaint, in another paragraph, averred that when the sheriff sold the land under the foreclosure decree, he did not sell the north half first, but offered it for sale, and receiving no bid therefor, sold the whole together, thus rendering the sale illegal and void.

All of the defendants answered, and Jackson, as guardian, filed an answer in four paragraphs, and afterwards an amended fourth paragraph. This answer was demurred to, the demurrer sustained, and exceptions taken. This answer, after making a general denial, averred that the deed from Bradbury to the Julians was not, at the time the land was purchased by Diggs or Moorman, of record, and that neither of them had any notice that such deed had been made until long after they had bought and paid for the land, and that neither of the Julians had ever been in possession of the land. The amended fourth paragraph of this answer was pleaded by way of estoppel, and, after setting up the matter previously averred, alleged that before Diggs brought his suit to foreclose his mortgage, the Julians were in partnership; that Jacob B. Julian went into bankruptcy; that plaintiff prepared and filed the schedule and affidavit of Jacob B., in which it was averred that the latter was the owner of the whole of the south half of the

land in controversy; that this land was conveyed to one Wright, as assignee; that Diggs had full knowledge of all these facts at the time he foreclosed and bought the whole of the land at sheriff's sale; that plaintiff had full knowledge of the foreclosure proceedings, and allowed the property to be sold without making claim of title; that after the land was purchased by Diggs, and before Moorman purchased of him, the plaintiff had filed his petition in bankruptcy, and in his schedule and affidavit stated that he owned no real estate; that when Moorman purchased, he did so with notice of the contents of such schedule and affidavit, and, believing and relying upon them as true, bought and paid for the land which plaintiff now seeks to recover. The court below, after hearing the evidence, found the facts to be substantially as stated in the complaint: That the plaintiff was the owner of the undivided south half of the land in dispute; that Diggs foreclosed his mortgage, but plaintiff was not made a party thereto; that the decree of foreclosure ordered the north half of the land to be first sold; that under the order of sale, the sheriff first offered the north half for sale, but receiving no bids, proceeded to sell the whole tract, Diggs becoming the purchaser, and immediately conveying the same to Moorman. And the court then found, as conclusions of law, that the foreclosure and sale of the land were void as to the plaintiff, who had the right to redeem on the payment of \$968.40.

The appellate court approved the ruling of the court below in sustaining the demurrer to Jackson's answer as guardian, and in passing upon this branch of the case maintained that the plaintiff had an interest in the land in controversy, as shown by a recorded deed of the land to him; he therefore had a right to be made a party to the foreclosure proceeding, in order to be affected or bound thereby, and when made a party he had a right to set up all his interest in the land. The court said: "Lien-holders and purchasers were bound to take notice of the record. The making and filing of the affidavits in the United States district court, in which the appellants were not interested, and were not parties, would not estop him from afterwards setting up his title to the land. It is not claimed or alleged that the appellee made any statement to the appellants, or to James Moorman, on which he or they relied, or that they were induced to do anything they did by reason of any statement of the appellee made to either of them, or which the appellee had any knowledge they, or either of them, were relying upon. It is averred that appellee knew of the foreclosure, and that he permitted and allowed the mortgage to be foreclosed, and the land sold, and made no claim of title. He had at that time a deed for the land, of record in the county where the land was situated, and the record spoke for him, and proclaimed that he had an interest, and of this record every person was bound to take notice; and he was not required to assert his title in any other manner, unless called upon to do so. If he had been called upon by a party in interest to speak upon the subject, then it would have been his duty to have declared his title. But the answer does not show that he was called upon by any person interested to assert his title, or that appellee knew they were relying upon the affidavit made by him in the proceedings in bankruptcy. The appellants were strangers to the proceedings in the district court, and in no way interested in such proceedings. It is true, it is alleged that Moorman knew of the affidavits, and relied upon them and believed them to be true, and, relying upon them, purchased the land; but it is not averred how Moorman gained such information, or that the appellee knew that he had any knowledge of the affidavits, or relied upon the truth of the same, and at the same time he had knowledge

of the deed which was of record showing he had an interest which was in conflict with the affidavits"; citing, as authority in support of the theory that the appellee was not estopped from setting up his deed and asserting title to the land, *Bigelow on Estoppel*, 4th ed., 552; *Hagford v. Johnson*, 74 Ind. 479.

It was contended that the court erred in holding that the sheriff's sale on foreclosure was void, but in reply to this the court said: "The appellee stands in a different relation to the proceedings than if he were but a junior lienholder. He is the owner of the land, subject to the mortgage lien, or what is termed the equity of redemption, and this court has repeatedly held that where the owner of the equity of redemption is not made a party to a suit of foreclosure, the decree is void as to him"; citing, in support of this ruling, *Curtis v. Gooding*, 99 Ind. 45; *Petry v. Ambroscher*, 100 Ind. 510; *Pauley v. Cauthorn*, 101 Ind. 91; *Jefferson v. Coleman*, 110 Ind. 515.

"Jackson, as guardian, filed a motion for a new trial in the court below, which was overruled, and exceptions taken, and it is contended here that there was no evidence to support the finding that Diggs sold the property mortgaged and foreclosed and purchased by him to Moorman, who now claims it as his. Counsel for the appellee do not deny that no evidence appears in the record upon which such finding is based, but contend that such evidence was introduced at the trial, that the court found the fact, and for this reason the finding must control. As the object of a motion for a new trial, after the court has found the facts, is to bring into the record all the evidence, so that it may be ascertained whether the evidence supports the finding, if there is no such evidence, the motion for a new trial should be granted. And in this case, as there is no evidence in the record to support the finding of the court, the appellants are entitled to a new trial. It is also contended by the appellants that the appellee is only entitled to redeem the portion of the land claimed by him, and that therefore the judgment should be set aside as to that part; but the court maintains that as the mortgage stands, as to the appellee, as if it had never been foreclosed, it is only proper that it should be foreclosed against him"; citing *Curtis v. Gooding*, 99 Ind. 45.

"The findings of facts are indefinite in regard to the amount found due on the mortgage, as to whether it was intended to add an amount for attorney fees accrued, or not, and so are the conclusions of law in regard to the appellee's rights to redeem uncertain and ambiguous, if not erroneous. It is impossible to tell what amount the conclusion states should be paid to redeem; whether it is \$969.40, or whether interest should be added to such amount, and it would be necessary, in any event, to reverse the judgment, with instructions to restate the conclusions of law; but as the judgment must be reversed as to Jackson, guardian of Moorman, for error in overruling the motion for a new trial, justice will be best subserved by a reversal, with instructions to sustain the motion for a new trial in favor of all of the appellants. Judgment reversed, at costs of appellee, with instructions to sustain the motions of appellants for a new trial, and for further proceedings in accordance with this opinion."

The subsequent case of *Fowler v. Lilly*, 122 Ind. 297, was commenced by the plaintiff, as guardian of Margaret E. Johnson, an insane person, for the partition of real estate. He claimed that his ward was the owner of an undivided one sixth of the land described in the complaint, as tenant in common with the defendants.

The court below found the facts to be, that J. P. Drake, in October, 1850, owned one hundred acres of land, conveyed to him by G. Kelly and wife. Drake platted the land into blocks and lots, among which is the land in com-

trovery, and Kelly held a mortgage for the unpaid purchase-money, covering the whole of the land conveyed, which mortgage was executed by Drake and wife. In 1854, Drake conveyed the land in controversy to one May, and in the same year Kelly foreclosed his mortgage without making said May and wife, who were in possession, parties. In 1862, the land in contest was purchased by I. E. Johnson, the husband of plaintiff's ward, and L. Jordan, at foreclosure sale under the decree in favor of Kelly. Johnson afterward conveyed his interest so acquired to Jordan, though his wife did not join the grantor in the deed. Johnson afterwards died, and his wife claims the land in dispute. The defendants claim the land as the grantees of one Lilly, who purchased the land in dispute from the widow and heirs of May, in 1873.

The judgment of the court below was to the effect that plaintiff's ward had no interest in the land in suit. In this view the appellate court concurred, and says: "The only claim made on the appellant's behalf to any title or interest in the land in dispute is through the foreclosure sale on the Kelly decree. But it is expressly found that the owner of the title to block 8 was not a party to the decree. That fact conceded, it follows that the purchasers under the decree took nothing by their purchase as against the owner of the fee, who was not a party to the foreclosure proceedings. Certainly the statement of this proposition is all that is necessary. It is contended that it does not distinctly appear, in the special finding, that Allen May was the owner of the land at the time the decree of foreclosure was rendered. No other inference can be drawn from the finding. If he died pending the suit, then it was necessary to substitute his heirs or personal representatives, and it is found that neither May nor his heirs nor personal representatives were parties to the foreclosure proceeding, and that they afterwards sold and conveyed the land to Lilly. The contention that it does not appear but that Lilly or his grantees had notice of Mrs. Johnson's interest at the time they became purchasers is without force, for the reason that she had no interest, either legal or equitable, so far as appears. The owner of the title not having been made a party, the decree of foreclosure was void as to him, and the purchasers under that decree took nothing: *Landon v. Townsend*, 112 N. Y. 93; 8 Am. St. Rep. 712."

ROGERS v. WESTERN UNION TELEGRAPH COMPANY.

[122 INDIANA, 306.]

TELEGRAPH COMPANY — FAILURE TO DELIVER MESSAGE — CONTRACT MADE IN FOREIGN STATE. — An action to recover the statutory penalty for failure to transmit and deliver a telegraphic message cannot be maintained in Indiana, under a contract made in another state for the transmission and delivery of the message to a point within the former state.

J. S. Scobey, for the appellant.

J. E. McDonald, J. M. Butler, A. H. Snow, J. M. Butler, Jr., and A. J. Beveridge, for the appellee.

COFFEY, J. This was an action in the circuit court to recover a statutory penalty for failure to transmit and deliver a telegraphic message. The first paragraph of the complaint

alleges that the appellant delivered to the appellee, at the city of Cleveland, in the state of Ohio, a telegraphic message which the appellee, for the price of fifty cents, at the time paid by appellant, agreed to transmit and deliver to the person to whom it was addressed, at the city of Greensburg, in the state of Indiana, and that the appellee wholly failed and neglected to transmit said message.

The second paragraph of the complaint is the same as the first, except that it alleges that the appellant transmitted the message to the city of Greensburg, in the state of Indiana, but that it wholly failed and neglected to deliver the same to the party to whom it was sent.

Each of these paragraphs sets out a statute of the state of Ohio, similar in its provisions to the statutes of this state, inflicting a penalty for a failure to transmit telegraphic messages.

A demurrer was sustained to each paragraph of the complaint, and appellant excepted.

On failure of the appellant to plead further, the court rendered judgment against him for the costs of the action.

The assignment of errors calls in question the correctness of the ruling of the circuit court in sustaining the demurrer to the complaint.

It is conceded by the appellant that it has been decided by this court that the courts of Indiana will not enforce the statutes of another state prescribing and inflicting penalties in cases like the one now under consideration. Under this admission, it is unnecessary to give any further attention to the statutes set out in the complaint.

It is contended, however, by the appellant, that as the message was transmitted by the appellee to the city of Greensburg, the failure to deliver it to the party to whom it was addressed was a violation of our statute, and entitles the appellant to the penalty thereby inflicted.

This contention cannot be maintained, for the cases which hold that we will not enforce the penal statutes of another state also hold that there can be no recovery under our statute in cases like the one before us, where the contract was made in a foreign state: *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526; 46 Am. Rep. 175; *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

In the case of *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175, it was said that unless we adopt the

view that the statute only applies to contracts made in this state, we shall be involved in endless difficulty. Any other rule would make the telegraph company amenable to different punishments for the same wrong; for it is quite clear that if the wrong is punishable by the laws of the place where the contract is made, it would be no answer to a prosecution there to plead a judgment rendered in another forum and under a different law. So, too, if we take a different view from the one indicated, we should be compelled to hold that the sender of a message from an office in Canada might come to our state and recover the penalty, although his sole contract with the corporation was made in a foreign country.

In the case of *Western Union Tel. Co. v. Reed*, 98 Ind. 195, the message was transmitted from the state of Illinois to this state. By the negligence of the company's employees the message was changed in its transmission. As the contract for transmitting the message was made in the state of Illinois, it was held that our statute did not apply.

We are of the opinion that the circuit court did not err in sustaining the demurrer to the complaint in this cause.

Judgment affirmed.

SEE COMPLETE NOTE to *Attrill v. Huntington*, 14 Am. St. Rep. 350-355, discussing the law relative to maintaining actions in one state to enforce penalties created by the statute of another state.

PHILLIPS v. DRESSLER.

[122 INDIANA, 414.]

EASEMENTS—RIGHT TO MAINTAIN GATE AT INTERSECTION OF PRIVATE WAY.

—The owner of the fee may maintain a gate at the place where a private way intersects the public road, as a reasonable and legitimate exercise of a right which resides in the owner of the servient estate.

M. Wood and T. J. Wood, for the appellant.

T. S. Fancher, for the appellee.

ELLIOTT, J. The appellant is the owner of sixty acres of land over which there is a private right of way extending north from a public road. The right of way was created by the grantor of the appellant prior to the latter's acquisition of title. A provision in one of the deeds reads thus: "Excepting and reserving the road as now running over said land from said Dutton's house, where he now lives, to the state road."

In another deed the provision is expressed in these words: "Also right of way over the road as now established from the house of the grantor to the Joliet road." The evidence shows that the way was a private one, and that for much of the time a gate was maintained across the way at the point where it intersected the public road, but that at some season there was no gate at that place. The controversy is as to the right of the appellant to maintain a gate at the point named.

Our judgment is, that the owner of the fee may maintain a gate at the place where the private way intersects the public road. It may be true that the owner of the servient estate cannot maintain an unreasonable number of gates, or otherwise unnecessarily interfere with the use of the way by the owner of the dominant estate, but we think it entirely clear that maintaining a gate at the place where the private way intersects a public road is a reasonable and legitimate exercise of the right which resides in the owner of the fee. We have found no substantial diversity of opinion upon this question, for the authorities are well agreed that it is the right of the owner of the servient estate to swing a gate across the private way. The law upon this subject is thus stated by an English author: "But in cases of a general grant, express or implied, or of necessity, the rule seems to be that gates or bars may be lawfully erected at the termini of such ways without any liability for obstructing the way, and the way-owner would be liable in trespass for unlawfully removing the same. The great preponderance of convenience to the land-owner over the slight inconvenience to the way-owner seems to make it reasonable in the eye of the law that such should be the rule. And if the land-owner may rightfully erect and continue such *quasi* obstruction without any liability, it seems to follow that the way-owner must duly replace the same after he has passed; and if damage ensue for his neglect of this duty, he would be liable to the land-owner therefor": Bennett's *Goddard on Easements*, 331. The American cases state the rule in stronger terms than those employed by the author from whom we have quoted: *Whaley v. Jarrett*, 69 Wis. 613; 2 Am. St. Rep. 764, and cases cited; *Short v. Devine*, 146 Mass. 119.

Judgment reversed.

EASEMENT.—Unless an open way is expressly granted, the grantor of a right of way may maintain gates or bars across it: Note to *Bakeman v. Talbot*, 88 Am. Dec. 282.

CULVER v. MARKS.

[122 INDIANA, 554.]

BANKS AND BANKING — NECESSITY OF PRESENTATION OF CHECK WHEN NO FUNDS ARE ON DEPOSIT. — Presentation of a check for payment and notice of non-payment to the drawer are not necessary when the latter has no funds on deposit for the payment of the check at the time when it should be presented, or when, having funds on deposit, he withdraws them, or when, by consent of the drawer, or agreement between him and the payee, the check is not to be presented for payment.

BANKS AND BANKING — CHECKS — PRESUMPTION AS TO BANK DRAWN AGAINST. — Checks dated "Lafayette, Indiana," and drawn on the "First National Bank," the evidence showing that there was such a bank at that place, are presumed, in the absence of anything to the contrary appearing, to relate to and to have been drawn upon that bank.

BANKS AND BANKING. — CHECKS DRAW INTEREST FROM THE TIME WHEN PRESENTED, or when they should have been presented if there had been any funds of the drawer in the bank with which to pay them.

BANKS AND BANKING. — EVIDENCE OF WILLINGNESS OF BANK TO PAY A CHECK of the drawer, notwithstanding the fact that he has no funds in the bank, is inadmissible in an action on the check, as the payee is relieved from making presentation and demand if the drawer has no deposit in the bank.

BANKS AND BANKING. — PAYEE OF CHECK takes it with the legal obligation to present it at the bank for payment, and failing to do so, if the drawer has funds in the bank to pay it, must suffer any loss ensuing from such failure; but if the drawer has no funds in the bank, the payee is excused from presenting the check for payment.

BANKS AND BANKING. — BANKS HAVE NO LEGAL RIGHT to allow the drawers of checks to overdraw their accounts, and to pay checks out of the funds of other depositors or the money of stockholders.

BANKS AND BANKING — ENTRIES ON BANK-BOOKS, ADMISSIBILITY OF. — In an action on a check, original entries in original books of the bank, made in the due course of business, are admissible to show the state of the depositor's account at the time the check was drawn, though some of the persons who made such entries are dead, removed from the state, or have no recollection of the facts represented by the entries, except that they were made in the due course of business, and were correct when made.

BANKS AND BANKING — EXPERT EVIDENCE — ABSTRACT OF BOOKS. — In an action on a check, the statement of an expert witness, who has examined the books of a bank and made an abstract thereof, is admissible in evidence when an opportunity to cross-examine is given.

PLEADING AND PROOF. — When each cause of action is declared on in several different forms of averment, the allegations of each paragraph of the complaint need not be proved.

J. R. Coffroth, T. A. Stuart, and A. L. Kumler, for the appellant.

B. W. Langdon and T. F. Gaylord, for the appellee.

OLDS, J. This was an action by Jacob F. Marks against Malinda Culver, administratrix of the estate of Moses C.

Culver, deceased, to recover a claim against the estate of the decedent.

It is contended by the appellee that the appeal was not taken and perfected within the time allowed by statute. The appellant asked and obtained leave of this court to appeal, which disposed of this question, and it is unnecessary to consider it further. Appellant's decedent died in December, 1884, and the claim was filed in February, 1885. The basis of the claim is three checks, copies of which are on file with the complaint, and marked A, B, and C, and are in the following words and figures:—

"A. LAFAYETTE, IND., Nov. 1, 1869.

"The First National Bank, pay to J. F. Marks, one thousand dollars.

"\$1,000. (Signed) M. C. CULVER."

"B. LAFAYETTE, IND., Dec. 8, 1870.

"First National Bank, pay to J. F. Marks, or bearer, five hundred dollars.

"\$500. (Signed) M. C. CULVER."

"C. LAFAYETTE, IND., Dec. 29, 1870.

"First National Bank, pay to J. F. Marks, or bearer, one thousand dollars.

"\$1,000. (Signed) M. C. CULVER."

Also, three promissory notes, one dated December 17, 1870, for \$1,051.34, executed by the decedent to appellee; one dated September 1, 1870, for \$550, executed by decedent to appellee; and one dated July 29, 1872, for \$2,000, executed by the decedent to one Smith Lee, and assigned by him to appellee. There are some nineteen paragraphs of complaint, most of them declaring upon the checks, and varying in their allegations. There were no further pleadings filed. There was a trial by the court, under the statute, and a finding for the appellee on the checks and notes aggregating \$7,694.31.

The court's finding it as follows: "The court, being in all things fully advised, finds that there is due the plaintiff, of and from the administratrix, to be paid out of the estate of the decedent, Moses C. Culver, on account of the note for two thousand dollars, and dated July 29, 1872, the sum of eight hundred and twenty-three dollars and twelve cents (\$823.12); on the due-bill dated December 17, 1870, the sum of seven hundred and ninety-six dollars and fifty-nine cents (\$796.59); on the two one-thousand-dollar checks, one dated November

1, 1869, and one December 29, 1870, the sum of three thousand nine hundred and thirty-six dollars and twenty-six cents (\$3,936.26); on the five-hundred-and-fifty-dollar note, dated September 1, 1870, the sum of one thousand three hundred and eighty-three dollars and thirty four cents (\$1,383.34), including one hundred and twenty-five dollars and seventy-five cents as and for attorney's fees; and on the check for five hundred dollars, and dated November 8, 1870, the sum of seven hundred and fifty-five dollars, being the principal and interest thereon from the first day of January, 1878, and making in the aggregate the sum of seven thousand six hundred and ninety-four dollars and thirty-one cents (\$7,694.31)."

The appellant demurred to each paragraph of the complaint, which demurrer was overruled, and exceptions taken. The appellant also filed a motion for a new trial, which was overruled, and exceptions taken; also, moved the court in arrest of judgment, which motion was overruled, and exceptions reserved; and these various rulings of the court are assigned as error.

No question is presented as to the sufficiency of the paragraphs on the notes, or the right of the appellee to recover the amount due upon them.

The paragraphs of the complaint are numerous, and we do not deem it necessary to set them out, as we can state the questions presented in much less space.

They all declare upon the checks, and aver facts to excuse the necessity for presentment to the bank for payment and notice to the drawer of non-payment, differing in the averments in this particular: Some aver that Culver, the drawer, did not have money or funds sufficient in amount in said bank on the day of the date and delivery of said check, nor did he have enough on the day after the date of drawing and delivering said check, in said bank to pay said check. The ninth paragraph, declaring on check dated November 1, 1869, alleges that Culver, the drawer, did not have money or means enough in said bank on the day of the date of said check, nor did he have sufficient funds or money in said bank until the eleventh day of November, 1869, to pay said check. Others aver that all the money or means said Moses C. Culver had in said bank on the day of the date of said check, or had at any time thereafter in said bank, were by said bank paid to said Moses C. Culver, or to other persons on the order, check, or request of the said Culver, and not to the plaintiff

on account of said check. Others aver that at the time of the execution and delivery of said check the said Moses C. Culver requested the plaintiff not to present said check to said bank for payment, and that he, the said Moses C. Culver, should be permitted to pay, and that he, the said Culver, would pay, said check without presentment thereof for payment to said bank, and the plaintiff then and there promised not to present for payment said check at said bank, and to permit the said Culver to pay the same without presentment for payment at said bank; that, in pursuance of said request of said Culver, and the promise of the plaintiff, the plaintiff did not present said check, nor was the same presented to said bank for payment.

The fourteenth paragraph, on the check dated December 29, 1870, alleges that Culver did not have money or means sufficient in amount in said bank on the day of the date of said check, nor did he have enough means or money in said bank for more than thirty days thereafter, to pay said check.

The foregoing are the averments in the respective paragraphs relating to the checks.

The several paragraphs are respectively based on the checks as the foundation of the action, and the checks constitute the cause of action: *Henshaw v. Root*, 60 Ind. 220; *Fletcher v. Pierson*, 69 Ind. 281; 35 Am. Rep. 214.

The general rule is, that a check must be presented to the bank for payment, and that notice of non-payment must be given to the drawer; but there are exceptions to this rule. In *Bolles on Banks and their Depositors*, page 325, section 333, it is said: "Another excuse is the lack of funds with the drawee. The drawing of a check under such circumstances, unexplained, is a fraud which deprives the maker of every right to require presentation and demand of payment."

In *Franklin v. Vanderpool*, 1 Hall, 78, it is held that if the maker of a bank check has no funds in the bank upon which it is drawn at the date of the check, it is not necessary for the holder to present such check at bank for payment in order to enable him to sustain an action upon it against the maker.

When the maker of a check withdraws his funds from the bank so that the check cannot be paid, no demand and notice are necessary: *Bolles on Banks and their Depositors*, p. 325, sec. 333; *Sutcliffe v. McDowell*, 2 Nott & McC. 251.

In 2 *Morse on Banks and Banking*, 3d ed., section 425, it

is said: "Presentment, however, may be altogether dispensed with, provided that, if made, it could not at the time be legally and properly met by the bank with a payment," and numerous authorities are cited in support of this statement. This is in accordance with a well-settled legal principle that the law requires no unnecessary thing to be done. Checks are presumed to be drawn against a fund deposited in the bank out of which they are to be paid; and if there is no such fund so deposited out of which they can be paid, the presumption is, that a demand will be of no avail, and useless, and it must be further presumed that the drawer knows the state of his account with the bank, and whether or not he has sufficient funds on deposit to pay the check, and if he has not, no demand is necessary, and if no demand be necessary, then certainly no notice is necessary; being no demand, there could be no notice of demand. It is further stated in Morse on Banks and Banking, section 425, that "regular presentation may be waived by conduct or representations; any agreement, express or implied, will excuse want of the usual formalities." It is further said, that "a check given as evidence of a loan to the drawer need not be presented to the drawee." This doctrine is held in the case of *Currier v. Davis*, 111 Mass. 480.

It is the well-settled rule that, in the absence of an agreement or special circumstances, a check shall be presented at least within banking hours on the day following the date of its delivery, if the bank on which it is drawn is in the same place where the payee lives or does business, and that the first presentment fixes the rights of the parties. If, upon such presentation, the bank offers and is willing to pay, and the payee refuses to accept it, and afterwards, and before it is again presented, the bank fails, as between the payee and the drawee, the payee suffers the loss: See Morse on Banks and Banking, secs. 421, 426. And it must necessarily follow, from the well-settled law regarding checks, that if the drawer has no funds in the bank at the time the payee is by law required to present the check for payment, no necessity for demand and notice exists, and the liability of the parties is fixed at this time. That is to say, if demand and notice be necessary, demand must be made on the day following the delivery of the check, if the bank is in the same place where the payee lives and does business; and notice must be given, and the liability is thereby then and there fixed, and the payee may immediately bring suit. So, on the other hand, it must logically

flow, and necessarily follows from this rule, that if the drawer has no money or funds on deposit in the bank at the time the payee is required to present the check, then the liability of the drawer is fixed without presentation and notice, and the payee may at once bring suit on the check, and whatever takes place afterwards in the state of his account at the bank can make no difference, and will not change the rights of the parties. The authorities cited, we think, are decisive of all the questions presented by the rulings on the demurrers to the several paragraphs of complaint, and that the general rule is, that the payee must present the check for payment, and give notice to the drawer of its non-payment, but that no presentation or notice is necessary when the drawer has no funds on deposit for the payment of the check at the time when the check should be presented; or if he had funds on deposit at the time, and withdraws the same, leaving none on deposit for the payment of the check, or if, by consent of the drawer, or agreement between him and the payee, the check is not to be presented at the bank for payment, then there is no necessity for presentation and notice. There was no error in overruling the demurrers to the complaint.

It is contended that the right of recovery was barred by limitation. What we have said in passing upon the complaint disposes of this question. The check being in writing, and constituting the foundation of the action, it is not barred by the statute of limitation.

A question is made as to the check. It is contended that as the complaint alleges that the checks were drawn on the "First National Bank of Lafayette, Indiana," and that there was no proof of such fact, except that the checks were read in evidence, and that the checks are drawn on "the First National Bank"; that the proof made by the introduction of the checks does not correspond with the averments of the complaint. The checks were copied and made a part of the respective paragraphs of the complaint which declared upon them, and showed affirmatively in each paragraph of the complaint the name of the bank upon which they were drawn. They were each dated at "Lafayette, Indiana," and drawn on the "First National Bank," and the name of no other place or bank appeared upon the check, and the evidence showed there was a First National Bank at Lafayette, and the fair presumption is, in the absence of anything appearing to the contrary, that it related to and that they were drawn upon

that bank: *Walker v. Woollen*, 54 Ind. 164; 23 Am. Rep. 689; *Roach v. Hill*, 54 Ind. 245; *Dutch v. Boyd*, 81 Ind. 146.

It is next contended that there is no evidence to support the allegations of the paragraphs of the complaint which allege that it was agreed that appellee should not present the checks at the bank for payment, but that Culver should pay them without presentation. This can make no difference. There were several other paragraphs of the complaint respectively declaring on each of the checks, and if the evidence supported one paragraph declaring on each check, the finding would be sustained. It was not necessary, because appellee declared on each cause of action in several various forms of averments, that he should prove the allegations of each paragraph of his complaint.

It is contended that the assessment of the amount of recovery is too large; that the court allowed interest upon the checks. In this there is no error under the law, as we have stated; the cause of action accrued upon the checks at the time they should have been presented if there had been money in the bank for their payment, and as the payee resided at the same place where the bank was doing business, this would be the next day after the delivery of the check, and appellee is entitled to interest from that date.

We now come to questions presented by the motion for a new trial, on the admission and rejection of evidence.

The appellant offered to prove by Mr. M. L. Pierce, president of the bank, that if, at the dates of the several checks, or at any time during the years 1869 and 1870, checks for like amounts had been presented to the First National Bank, drawn by Moses C. Culver, by the holder of such checks, they would have been paid. The offer was properly made. The witness was sworn, and asked the proper question, and the evidence was excluded. In this ruling of the court there was no error. The evidence offered is to the effect that the bank would have paid the checks, without regard to whether Mr. Culver had funds in the bank or not. It is a well-settled rule that the liabilities of the parties are fixed by the fact of the drawer having or not having funds in the bank out of which the check could be lawfully paid, and the fact that he had no funds in the bank against which the check is drawn, and out of which he had a legal right to have it paid, or in other words, if the bank was not at the time indebted to the drawer for money deposited, whereby he had the right to expect the bank

to pay the check and charge it to him as against such deposit account, then the payee was relieved from making a demand; and this cannot be changed by a willingness on the part of the bank to pay the check of the drawer, notwithstanding he may have no funds on deposit.

The payee took the check with the legal obligation resting upon him to present the check at the bank for payment, and if he failed to do so, and the drawer had funds in the bank to pay it, and loss ensued by reason of such failure, the payee suffers the loss; but if the drawer had no funds in the bank for the payment of the check, the payee is excused from presenting the check for payment. If the drawer had no funds in the bank at the time for presentment for payment, there is no legal obligation resting upon the payee to present it for payment.

The bank had no legal right to permit the drawer to overdraw and pay his checks out of the funds of other depositors or the money of the stockholders.

The next question for consideration is the exception of the appellant to the ruling of the court to the admission in evidence of the entries in the books of the First National Bank made in the usual course of business, showing the state of the account of said Moses C. Culver at and subsequent to the execution of the checks sued upon. As preliminary to the introduction of the entries in these books in evidence, it was shown by the clerks and officers of the bank produced in court as witnesses, and as to the entries made by such witnesses, that they were, at the time the entries were made, the proper and authorized book-keepers to make such entries; that the entries were made by them in the due course of business in the discharge of their duties, and were correct when made; that the entries made by them were original, and entered by them in books kept for that purpose, and that they had no recollection of the facts represented by the entries.

As to the entries made by parties who were not witnesses, it was shown that the enterer was, at the time the entry was made, the proper book-keeper and agent of the bank to make the entries in the due course of business; that the entries were original entries on original books made by such book-keepers in due course of business, and were in the known handwriting of such book-keepers; and that the enterer was dead, or a non-resident of the state of Indiana. After the making of such

preliminary proof, the entries were admitted in evidence over the objection of the appellant.

It was proper to prove, in this case, the state of Moses C. Culver's account with the bank upon which he drew the checks at the time he drew them, and subsequent thereto, under the issues in the case. And it is pertinent to the question to consider how such facts could be proven if the evidence introduced was not admissible or competent for that purpose.

The bank with whom he did business, and upon which he drew the check, kept books, and made an entry of all their business, of the money deposited by Culver, and checks drawn by him and paid by the bank. The books were kept by disinterested parties. Some of the persons who at the time of the transactions kept the books, took the deposit, and placed it to Culver's credit, paid the checks drawn by him, and entered them on the books or charged them to his account, were dead, others were beyond the jurisdiction of the court, and others had no personal recollection of the transaction except to know that the books were kept in due course of the banking business, and were correct, and showed a correct statement of the account.

Unless the evidence admitted was competent, the appellee is deprived of making proof of the facts. *Price v. Torrington*, 1 Smith's Lead. Cas., 9th ed., 566, was an action for beer sold and delivered. It was held that a book containing an account of the beer delivered by the plaintiff's drayman, and which it was duty of the drayman to sign daily, was competent to prove the delivery, on proof that the drayman was dead, and of his handwriting.

In a note to this case it is said: "A party's own books of account and original entries are now in most, if not all, of the United States received as evidence of a sale and delivery of goods to or of work done for the adverse party." On the same subject it is further said: "The reason for its introduction has never been placed, by any court, on higher ground than that of necessity. For, in view of the number and frequency of transactions of which entries are daily required to be made, the difficulty and inconvenience of making formal common-law proof of each item would be very great. To insist upon it, therefore, would either render a credit system impossible, or leave the creditor remediless."

In 1 Greenleaf's Evidence, 14th ed., section 115, it is said: "It is upon the same ground that certain entries made by

third persons are treated as original evidence. Entries by third persons are divisible into two classes: 1. Those which are made in the discharge of official duty, and in the course of professional employment; and 2. Mere private entries. Of these latter we shall hereafter speak. In regard to the former class, the entry, to be admissible, must be one which it was the person's duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant."

In 1 Wharton on Evidence, 8d ed., section 238, it is said: "An accountant or other business agent may be regarded as a member of a well-adjusted business machine; noting, in the proper time, and in the proper way, what it is his duty to note. If he has no personal motive to swerve him, the inference is, that what he does in this way he does accurately; and his evidence, if there be nothing to impeach it, rises in authority precisely to the extent to which he is to be regarded as a mechanical and self-forgetting register of the events which his accounts are offered to prove. Hence it is that the memoranda, or book-entries, of an officer, agent, or business man, when in the course of his duties, become evidence after his decease, or after he has passed out of the range of process, or become incompetent to testify of the truth of such entries; subject, however, to be excluded if it appear that in making the entries he was not registering but manufacturing current facts." The rule as stated by Greenleaf and Wharton is well supported by authorities: *Sickles v. Mather*, 20 Wend. 70; 82 Am. Dec. 521.

In the case of *Faxon v. Hollis*, 18 Mass. 427, the book of a blacksmith, kept in ledger form, the items being first noted down on a slate and then entered in the book, was held to be competent evidence: *Reynolds v. Manning, Stimpson, & Co.*, 15 Md. 510; *Kelsea v. Fletcher*, 48 N. H. 282; *Coolidge v. Brigham*, 5 Met. 68; *New Haven etc. Co. v. Goodwin*, 42 Conn. 230. In *Alter v. Berghaus*, 8 Watts, 77, it is held that the absence of a witness from the state, so far as it affects the admissibility of secondary evidence, has the same effect as his death. This was in relation to the admission in evidence of original entries in books made by such absent person.

We think the evidence is clearly admissible; but we might add that as regards the books kept by book-keepers and officers of national banks, by section 5209 of the Revised Statutes of the United States, it is made a penal offense to make a

false entry in any such books. So that these entries were not only made as original entries in due course of business, but the persons making them were liable to criminal prosecution, and upon conviction to suffer imprisonment if they made a false entry.

A book-keeper for the bank made out a statement of all the items of Culver's account appearing in the books of the bank, and appeared and was sworn as a witness, and stated that he had prepared such statement and had it with him, and, with the books before him, was interrogated as to what items appeared in the account. The court permitted such statement so made out and testified to by the witness in evidence, and allowed the same to be read to the jury over the objection and exceptions of the appellant, and this ruling of the court is complained of as error.

This was a long statement of account, and the witness who made out the statement was subject to cross-examination. The appellant had an opportunity to test its correctness and cross-examine the witness who made out the statement.

The appellant had as full and complete an opportunity to discover any error in the statement made by the witness as if he had appeared as a witness and testified from the books without making any written statement.

Where the entries in books are numerous and complicated, it is competent to permit an expert book-keeper who has examined the books to give a summary oral statement of their contents and computations made. See *Elliott's Work of the Advocate*, 217, and authorities there cited. See also *Von Sachs v. Kretz*, 72 N. Y. 548; *McCormick v. Pennsylvania etc. R. R. Co.*, 49 N. Y. 315; *Howard v. McDonough*, 77 N. Y. 592. And we can see no reason why, when such expert witness, who has examined the books and made an abstract of them, testifies as a witness, and opportunity is given for cross-examination in regard to such statement, as in this case, the statement may not be admitted in evidence, and read to the jury. We think the abstract of the books was properly admitted. But the original entries made in the books were also in evidence in this case, and no complaint is made that the statement did not correspond with the books. Whether properly admitted or not, no harm could have resulted to the appellant by reason of the admission of such statement, and therefore no reason exists for the reversal of the case: *Citizens' State Bank v. Adams*, 91 Ind. 280; *Hays v. Morgan*, 87 Ind. 231, 235, 236.

There is a further question as to the ruling of the court in refusing to allow the appellant to ask one Spencer a cross-examining question. We have considered this, and there was no error.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

PRESENTMENT OF A CHECK FOR PAYMENT must be made, and made within a reasonable time, to hold the drawer liable thereupon: *Parlier v. Eddick*, 65 Miss. 242; 7 Am. St. Rep. 647; *Holmes v. Roe*, 62 Mich. 199; 4 Am. St. Rep. 844; *Bassenhorn v. Wilby*, 45 Ohio St. 333. But there is no such necessity for demand of payment when the drawer has no funds in the bank upon which the check is drawn: *Kinson v. Stanton*, 44 Wis. 479; 23 Am. Rep. 601, and note; *Fletcher v. Pierson*, 60 Ind. 281; 35 Am. Rep. 214; *Brunk v. Barrett*, 62 N. Y. 400; 37 Am. Rep. 569.

BANKS AND BANKING. — The practice of paying overdrafts, even to persons of good standing with the bank, has no authority in sound usage or in law: *Lancaster Bank v. Woodward*, 18 Pa. St. 357; 57 Am. Dec. 618.

BOOKS OF ACCOUNT AS EVIDENCE: See extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191-199; *Müller v. Slay*, 145 Mass. 102; 1 Am. St. Rep. 442, and note; *Reynolds v. Sumner*, 126 Ill. 59; 9 Am. St. Rep. 323.

CASES

IN THE

SUPREME COURT

OF

LOUISIANA.

CONOLLY v. CRESCENT CITY RAILROAD COMPANY.

[41 LOUISIANA ANNUAL, 57.]

COMMON CARRIERS—RIGHT TO EXCLUDE SICK PASSENGER.—A common carrier by street-railway owes obligations to and is bound to protect both its sick and its well passengers, and when the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. This right of exclusion cannot be exercised arbitrarily or inhumanely, or without due care and provision for the safety and well-being of the ejected passenger, and for any abuse of this right, or oppression in its exercise, the carrier is responsible in damages.

COMMON CARRIER—STREET-RAILWAYS—DUTY TO SICK PASSENGER.—Where a passenger on a street-car, who has been conveyed a considerable distance without voluntary misconduct on his part, is suddenly stricken with apoplexy, and thus rendered helpless and speechless, and subject to severe fits of vomiting, his removal from the car, by the driver, into the roadway of the street, and leaving him there, on an inclement day, without the slightest attempt at that time or afterward to have him taken care of, is a gross violation of duty, for which the carrier is liable in damages, nor will the mistaken supposition of the driver, that he was drunk at the time of his exclusion, excuse the carrier's liability.

COMMON CARRIER—DUTY TO SICK PASSENGER—PRESUMPTION.—An expressed desire by a passenger by street-railway, after being stricken with apoplexy, to leave the car while he thought he was able to do so and to take care of himself, will not raise the presumption that he desired to be removed into the street, and there left without care and attention after he had fallen down in an utterly helpless condition.

ACTION for damages for personal injuries. Judgment for plaintiff. Defendant appeals.

John M. Bonner, for the appellant.

James Wilkinson, and Zacharie and Armstrong, for the appellee.

FENNER, J. On a Sunday in December, at about two o'clock of the afternoon, Patrick Conolly, a sober, respectable citizen of fifty-five years, entered a car of the defendant's street-railway, and paid his fare as a passenger. Nothing in the evidence indicates that he exhibited any sign of intoxication or was guilty of the slightest impropriety of behavior on entering the car, or until he had ridden a considerable number of squares (from Terpsichore to Third Street), and the testimony is conclusive that in point of fact he was perfectly sober. After passing Third Street, he was suddenly stricken with apoplexy, accompanied, as the medical experts prove to be common, with severe vomiting. The car had numerous passengers, to whom this vomiting undoubtedly occasioned serious discomfort and inconvenience. Some of them left the car on account of it, while others of those remaining suggested that he should leave the car, and took steps to call the attention of the driver to the necessity of removing him. The sick man had sufficient consciousness and sense of propriety left to observe this, and he said: "I will get out myself"; but on rising to do so, he fell prone upon the floor, where he lay absolutely helpless. As far as appears, he never spoke again, and was incapable of taking any care of himself. The driver then came back, and, with the assistance of a passenger, bodily lifted him, carried him out of the car, and laid him down in the street, between the car-track and the gutter, between two and three feet from the former. The evidence is conclusive that, almost immediately afterward, and while the car was moving off, he shifted his position by some convulsive movement, so that his legs were across the rail of the track. This is proven by passengers who saw him in this position as the car moved away, and by others who came to him immediately afterwards. The driver, however, after thus summarily disposing of his stricken passenger, paid no further attention whatever to the matter. He took no steps to secure for him any relief or assistance. It is doubtful if he made any report of the incident to his employers, and if he did, it was not acted upon. He simply went his way in a serene confidence that, as he expresses it, he had "done his duty," and although he passed the point several times while his ejected passenger was still lying help-

less on the adjoining sidewalk, he states that he does not recollect whether he saw him or not. A female passenger, observing his perilous position across the track, went to his assistance, and, with the aid of a gentleman, removed and laid him on the sidewalk. Here he remained for more than four hours, on a bleak, drizzling December day, in the open street, without aid or relief, in his terrible condition. At last the police authorities came to his assistance, and he was conveyed to the Charity Hospital, where he died on the following morning.

It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger, stricken with apoplexy while under its charge, in the manner above indicated, without a breach of the plainest obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one "more honored in the breach than in the observance." But there is no such precedent; and those cited by defendant's counsel are far from sustaining the position.

No doubt a carrier owes obligations to its well passengers as well as to sick passengers, and is bound to protect the rights of both. When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus if he had cholera, or small-pox, or *delirium tremens*, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street-car, the right of the carrier, in protection of the latter's privileges, to exclude him, would undoubtedly arise. Such is the reasonable doctrine of the cases cited: *Lemont v. Washington etc. R. R. Co.*, 1 Mackey, 180; 47 Am. Rep. 238; *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304; 87 Am. Dec. 714; *Murphy v. Union R'y Co.*, 118 Mass. 228; *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543; *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

But none of these cases hold that this right of exclusion can be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized. Thus in the Kansas case, above quoted, the court said: "Under these facts, the

propriety of his removal cannot be doubted. . . . The duty of the railroad company, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. They could not leave him on the platform, helpless, exposed, and without care and attention. It was its duty to have exercised reasonable care and diligence to make temporary provision for his protection and comfort." This was a case of intoxication.

And in the case most relied on, *Lemont v. Washington etc. R. R. Co.*, 1 Mackey, 180, 47 Am. Rep. 238, the supreme court of the District of Columbia, after recognizing the right of removal, is careful to add: "Of course, for an abuse of this discretion, or for any oppression in its exercise, the company would be responsible."

In another case, the court, while recognizing the right of ejection, said: "It does not follow that the right may be exercised in such manner, under such circumstances, or against a person in such physical or mental condition as that death or serious bodily harm will necessarily or even probably result from putting him off": *R. R. Co. v. Sullivan*, 16 Am. & Eng. R. R. Cas. 390. See also *Hall v. South Carolina R'y Co.*, 28 S. C. 261; *Lovett v. Salem etc. R. R. Co.*, 9 Allen, 557; *Higgins v. Watervliet etc. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293.

We conclude, therefore, that the conduct of the defendant's agent, in turning out this helpless and speechless sick passenger into the roadway of the street, and there leaving him, on an inclement day, without the slightest attempt, at the moment or afterward, to have him taken care of, was a gross violation of its duty.

The company attempts to shield its agent on two special grounds, viz.: 1. That he supposed, and appearances justify him in supposing, that Conolly was drunk. Even if his illness had been the result of drinking, yet he had ridden a considerable distance without misbehavior, and was never guilty of any, except in the sudden access of vomiting, bringing about a condition of complete helplessness. In such case, the duty of the company to see to his being taken care of, after ejection, would have arisen, and would have been abridged by no fault on his part, because, until his sickness, he had been in fit condition to take passage, and had committed no voluntary misbehavior. Moreover, it is admitted that Conolly was not under the influence of liquor, and the assumption that he was so was

a rash one, under the circumstances, and the company, not Conolly, must suffer for the mistake.

2. It is claimed that Conolly had signified his desire and had attempted to get out, and that the driver only helped him to accomplish his purpose. That he wished to get out while he thought he was able to do so and to take care of himself may be true; but to suppose that he desired to be put out, and left in the street, after he had fallen down in an utterly helpless condition, is too preposterous to merit consideration.

We are not here concerned with the measure of the duty which a street company operated under the conditions prevailing in the city of New Orleans owes to a passenger in such unhappy case, nor with the kind or degree of care which it is bound to take for his protection. If we were, we should give due consideration to such conditions, and would be careful to adjust the duty according to practicability. But the defense here rests upon the entire absence of any effort whatever to perform the duty, and a denial that any duty arose in the premises. Such a defense can receive no sanction at our hands.

Nothing remains for determination but the measure of damages.

The cause of action arose prior to the recent amendment of article 2315 of the Revised Civil Code, and the damages recoverable are those only which were suffered by Conolly.

The case was tried twice before a jury. The first verdict was for fifteen hundred dollars, on which a new trial was granted. The second verdict, from which the present appeal is taken, was for two thousand five hundred dollars.

The evidence indicates that Conolly was not entirely deprived of consciousness, but his faculties were no doubt greatly obtunded. His sufferings were severe; and though he must have suffered in any event, it would be a reproach to the medical art to suppose that it could not have means to alleviate them, had he received proper attention.

The medical testimony indicates that the attack was necessarily fatal. The humiliation of his position was extreme, and it is probable that he felt that to some extent, because one witness states that when asked if he was drunk, he shook his head.

On the whole, considering all the circumstances, we consider that an award of fifteen hundred dollars will do justice.

It is therefore ordered and decreed that the judgment ap-

pealed from be amended by reducing the amount to fifteen hundred dollars, and that, as thus amended, the judgment appealed from be affirmed, plaintiff to pay costs of appeal.

ON APPLICATION FOR REHEARING.

FENNER, J. The propositions decided by us in this case, which are fully, though briefly, condensed in the *syllabus*, seemed to us so simple, so conservative, so limited, that we confess our amazement at the prodigious corollaries and consequences which are attached to them in the brief for rehearing. While we are hopeful, and indeed confident, that no other person will ever make such deductions from the language used, we will, for the satisfaction of counsel, expressly disclaim any purpose to convert the street-railway of his client into an "eleemosynary institution," or to require it to add to its equipment a supply of doctors and trained nurses, or an ambulance corps. The plain obligation to abstain from inhumane treatment of a sick passenger, which the law imposes upon carriers, may be discharged without the aid of such expensive appliances. But, at the same time, we do most stoutly hold to our view that this obligation is not, as counsel suggests, a mere moral duty resting on carrier only in common with all other persons, but is a specific legal duty arising from his contract, and enforceable by all legal sanctions.

We are bluntly charged with deciding a case "not before us." We are in the habit of looking for the case before us in the record, and not in the briefs of counsel; and this charge would have been less flippant had counsel referred to any page of the record contradicting a single fact stated by us, which he has not done, and could not do.

We are reproached with attributing to counsel an admission which he has not made, viz., that Conolly was not drunk. As the evidence was conclusive and uncontradicted that he was not drunk, and as neither in oral nor printed argument did counsel assert that he was drunk, we deemed ourselves justified in treating this as an implied admission. If we were mistaken, there is no difference between a fact clearly proved and one admitted, and the error seems inconsequential.

We are accused of using "hard words," and of violating the amenities which should exist between court and counsel. The scant observance of those amenities exhibited in this brief,

which we notice with equal surprise and regret, is not justified by any conscious offense on our part. The supposition which we characterized as "too preposterous for serious consideration" was one attributed by us to the driver, and not to counsel. Had we thought that the counsel had adopted this supposition as his own, we might have sought for words more polite in which to qualify it, but we should have been compelled to substitute others not less emphatic.

It is claimed that the driver's mistake, in supposing Conolly was drunk, justified his course, and screens the company from liability. If drivers are authorized to assume that every person who becomes ill and vomits in a car must necessarily be drunk, the soberest citizen is liable every day to incur the calamity which befell Conolly, and to be treated in the same way. If they are not authorized to make such assumption from those facts alone, then there was absolutely no foundation for it in this case; because Conolly had ridden a long distance without any misbehavior or improper conduct until he was suddenly stricken by apoplexy and attendant vomiting. No other fact supported the assumption, and every prior circumstance opposed it. We say, therefore, that if the driver honestly believed that Conolly was drunk, the honesty of that belief cannot excuse its manifest rashness and improvidence, or exonerate the company from liability for his fault.

The fact that some of his fellow-passengers, who had no responsibility or duty in the premises, jumped to the same uncharitable conclusion cannot excuse the driver, who was charged with serious duties, and was bound to have strong and reasonable grounds before acting in so summary and cruel a manner.

The only question in this case on which there was even the slightest doubt or hesitancy in the mind of any member of the court was as to the measure of damages. That was the subject of full discussion, which, considering that, though years had elapsed, the judgment allowed no interest, resulted in an agreement on the sum named.

While sensible that in such cases ideal justice cannot be done, we adhere to the judgment.

Rehearing refused.

STATE v. BROUSSARD.

[41 LOUISIANA ANNUAL 52.]

JURY — INTOXICATION — VERDICT AND SENTENCE WILL BE SET ASIDE, where it appears that members of the jury, during their deliberations, were allowed to indulge in an excessive use of intoxicating liquors, and the consumption of a pint and a half of whisky by two members of the jury between the hours of midnight and the following eleven o'clock, rendering them sick at the time that the verdict was reached, in such excessive use of such liquor as will avoid the verdict.

E. G. Hunter and John C. Ryan, for the appellant.

Walter H. Rogers, attorney-general, and *James Andrews*, district attorney, for the state.

POCHE, J. Appealing from a sentence resting on a conviction of horse-stealing, the accused presents numerous complaints, involving mainly the alleged misconduct of the jury who served on his trial.

Our review of the case has led us to the conclusion that one of the acts of alleged misconduct of the jury is, of itself, fatal to the validity of the proceedings. That is, the charge that, during their deliberations, the members of the jury were allowed to indulge in an excessive use of intoxicating liquors.

It appears, from the record, that the case was given to the jury at about six o'clock in the evening, and that a verdict was reached the next morning at about eleven. It is in proof that during that space of time the jury were served with two pint bottles and about four six-ounce bottles of whisky, the greater part of which was actually consumed by only two members of the body. The evidence does not show by whom the liquor was furnished or supplied, or that it was done under the orders or with the consent and approval of the trial judge, and it is not shown that any of the members were or became intoxicated from the use of the liquor thus consumed.

But it is in proof that in the morning, between daylight and eleven o'clock, two members of the jury, together, drank and consumed a pint and a half of whisky, after which they became sick, and were unable to partake of any breakfast, and were in that condition at the very moment that the verdict was agreed upon. We are constrained to believe that the absorption of so much intoxicating liquor on empty stomachs, after a night of discomfort, by these two jurors, must have had an injurious effect upon their minds, and that it was the immediate cause of the sickness which they then felt.

Under the facts in the record, and in view of the amount of intoxicating liquor imbibed by these two jurors, we have no hesitation in holding that they, at least, were not in a condition to exercise the cool and dispassionate judgment which the law expects of every juror in deliberating over a cause involving the life or liberty of a fellow-being, and that, as a consequence, the accused has not had a trial by twelve men "good and true," as the law contemplates.

We feel very confident that, in thus ruling, we make no departure from the line of jurisprudence under which it is settled that the verdict of a jury in a criminal cause is not to be vitiated by the mere fact that, during their deliberations in a protracted trial, the jury were allowed a moderate use of spirituous liquors as refreshments or as a stimulant: *State v. Caulfield*, 23 La. Ann. 148; *State v. Dorsey*, 40 La. Ann. 739.

It would be difficult to formulate any affirmative rule or to prescribe an inflexible limit to the practice, and courts can do no more than to guard against excesses in determining such questions. But the circumstances of this case disclose an outrageous abuse of the privilege, which no court will sanction or tolerate, and which loudly calls for rebuke from any one who believes in a proper administration of justice, or in the solemnity of trials in criminal causes.

We have been at great pains to examine all the cases within our reach in which the point was raised, with varying results, depending upon the gravity of the charge, and we feel mortified to see that our reports will contain the worst case of its kind thus far to be found in the books: *Proffatt on Jury Trials*, 459-463.

It is therefore ordered that the sentence appealed from be avoided, that the verdict of the jury be set aside, and that the cause be remanded to the lower court for further proceedings according to law.

AS TO WHEN THE DRINKING OF INTOXICATING LIQUORS BY A JUROR or jurors will avoid a verdict, see note to *Davis v. State*, 9 Am. Rep. 764, 765.

RAYMOND v. PALMER.

[41 LOUISIANA ANNUAL, 425.]

PARTNERSHIP. — MEMBERS OF PARTNERSHIP ARE DISTINCT BEINGS from the firm, as well as from each other, and their rights and liabilities are to be tested and adjudicated accordingly. Hence a bank has no lien or claim on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them from the firm.

PRINCIPAL AND AGENT — RATIFICATION OF AGENT'S UNAUTHORIZED ACTS. — Acquiescence or long silence of the principal touching the unauthorized or illegal act of his agent after notice is a ratification thereof.

W. S. Benedict, and Rouse and Grant, for the appellants.

Henry C. Miller, for the appellee.

POCHE, J. Plaintiffs brought this suit as commissioners of the Louisiana Savings Bank and Safe Deposit Company, in liquidation, to recover 177 shares of Louisiana lottery stock, alleged to have been the lawful property of said corporation on the 27th of May, 1879, when said stock was illegally pledged, as his property, to the People's Bank by E. C. Palmer, then the president of the Louisiana Savings Bank. At the instance of the commissioners, the pledged stock was sequestered.

On motion of Palmer, the sequestration was bonded on the 18th of February, 1880, on a bond of \$8,585, which was then the market value of the stock after deducting \$10,000, the amount for which it had been pledged by Palmer, the stock being then worth \$18,585.

On the 24th of February, 1880, the stock, which stood in the name of Palmer on the books of the lottery company, was sold by him, through a broker, to Moore, Hyams, & Co., for the sum of \$22,125, at the rate of \$125 a share of a par value of \$100.

In his answer, Palmer claimed that he was the true owner of the stock at the time that it was pledged by him to the People's Bank.

He avers that the stock had been originally pledged to the savings bank by one John Mathers, Jr., to secure the latter's indebtedness to the bank, accompanied by the customary form of transfer in blank, followed by a subsequent transfer to Palmer, to be held by him for the benefit of the bank, as pledgee. He then avers that, by resolution of the board of directors under date of March 31, 1879, he was authorized and directed to sell said stock at its market value, and that, after repeated and

vain efforts to obtain a better price, he took up the stock for himself at \$50 a share, making the total price of \$8,850, and which was the highest obtainable, which amount was paid by him to the bank, all to the full knowledge of the directors, which sum thus paid by him was credited to the account of John Mathers, Jr., the pledgor.

The suit was instituted on the 18th of November, 1879. Palmer's answer was filed on the 3d of December following, from which time no steps were taken and no further proceedings were had in the litigation until the 4th of February, 1887, when plaintiffs filed an amended petition, making the lottery company a party, praying for dividends in the sum of two hundred and fifty thousand dollars, and reiterating their original demand against Palmer and against the People's Bank.

On the 19th of March, 1888, plaintiffs filed a second amended petition for the purpose of bringing into court the firm of Moore, Hyams, & Co., the purchasers of the stock from Palmer; judgment was asked against them for the restitution of the 177 shares of stock, and in default of the delivery of the same, for judgment against the firm at the rate of one thousand dollars a share, alleged as the then market value of the stock, as well as for dividends received by them thereon.

The defense of that firm was a general denial, coupled with the averment of their good faith in the purchase of the stock, which they acquired in open market from persons in the habit of selling such things, before paying which they saw that the same had been duly transferred to them on the books of the company. The answer ended with a call of the lottery company in warranty.

As the record shows that the People's Bank has been reimbursed the amount of its loan to Palmer, that corporation is thus stripped of all interest in the controversy, and is therefore practically out of the case.

Judgment was rendered in favor of plaintiffs against the defendant Palmer in the sum of \$18,580, as the value of the stock on February 18, 1880, with legal interest from that date, with lien and privilege on the property sequestered, so far as represented by the forthcoming bond given to release the sequestration, and in all other respects the judgment went in favor of all the other defendants.

Palmer has appealed from the judgment against himself, and plaintiffs appeal from the entire judgment.

Considering the restricted issue presented by the pleadings,

an immense mass of testimony and of documentary evidence comes up to swell the voluminous record in this case, in which an unprecedented latitude was allowed to plaintiffs' counsel in a tedious investigation of complicated matters, accounts, and even of gossip which had not the remotest bearing on the true issues of the controversy, and which our duty compelled us to examine in our search for the truth. After a patient and painful labor to separate the chaff from the grain, we find the following as the salient, uncontested facts bearing on the issues presented for decision:—

The 177 shares of stock in suit were the lawful property of John Mathers, Jr., who pledged them to the Louisiana Savings Bank and Safe Deposit Company to secure two loans aggregating together the sum of twelve thousand dollars, represented by two notes payable on demand, and long past due on the 31st of March, 1879, the day on which the board of directors, by resolution, instructed their president (who was E. C. Palmer, the principal defendant herein) "to realize on that stock" and on other values enumerated in the resolution. The pledge included the authority to the pledgee to sell the stock at public or private sale, and without recourse to legal proceedings for said purpose.

At that time the stock of that company was as low down as it had ever reached since the company had been put into operation.

By an act of the legislature passed during the session of 1879, and approved on the 27th of March of that year, the charter of the lottery company had been repealed, and great consternation prevailed among all the holders of its stock, to such an extent that for a few days there was no market at all for such stock.

At that juncture the savings bank was in great financial distress, soon culminating in disastrous insolvency, which led to the closing of its doors on the 30th of June of that year.

It is thus apparent that the board of directors were impelled by two combined and imperious reasons to dispose of that stock. Towards the end of May, owing to well-known causes, useless to enumerate here, the stock of the company had somewhat recuperated, and was quoted on the market at forty-nine to fifty dollars per share.

The stock involved in this case was repeatedly thrown on the market, without an offer up to fifty dollars a share, from the 31st of March up to the 27th of May, 1879, when Palmer,

the defendant, concluded to take it for himself at that, which was the highest market price.

On the same day he pledged it to the People's Bank to recover his note of \$10,000; and on the same day he deposited to his credit in the savings bank the amount which he had realized on his note, to wit, \$9,573.75. On the 29th of May he drew his check for \$8,850 to the order of the cashier of his bank, in payment of the stock in question, and on that day that amount was credited on the books of the bank to the account of John Mathers, Jr., with a corresponding debit to the deposit of E. C. Palmer, which on that day showed a balance of \$25,406.25 in his favor as a depositor.

Owing, doubtless, to the enactment by the constitutional convention of an ordinance known as article 167 of the constitution, and of the adoption, on the 2d of December, 1879, of that constitution by the people, the value of lottery stock began to appreciate very rapidly, and by the 18th of February, 1880, when Palmer bonded plaintiffs' sequestration, it was quoted on the market at \$105 a share, on which basis the amount of the forthcoming bond was predicated. By the 24th of that month that stock was quoted at \$125 a share, and it was on that day and at that price that it was sold by Palmer's broker to Moore, Hyams, & Co.

And by the time that the judgment in this case was rendered, in July, 1888, that stock had reached the phenomenal value of one thousand dollars a share.

It also appears that John Mathers, Jr., the original owner of the stock, and the pledgor thereof, had full knowledge of the transactions hereinabove recited, and that he made no objection. In April, 1881, Mathers made a voluntary surrender of his property under the insolvent laws of this state, and in his schedule of assets he entirely failed to include or make any reference to the stock in question, and in the statement of his liabilities he acted upon the condition of his account with the bank as affected by the credit of \$8,850, arising out of the sale of the stock which he had pledged to that corporation.

It is hardly possible to account for Mathers's conduct in omitting to include in his schedule stock which was then worth over thirty thousand dollars, pledged to secure an indebtedness of twelve thousand dollars, and for his failure and that of his syndic to subsequently urge any claim to pledged

property which finally reached the value of one hundred and seventy-seven thousand dollars, on any other theory than that of a full acquiescence in the disposition made thereof.

As to other pertinent facts which are hotly contested between the parties, and as to which the evidence is conflicting, we have reached the following conclusions: Plaintiffs earnestly contend that the check of Palmer of \$8,850 could not, in law, be considered as a valid payment of the stock, even if he had had the capacity to become the purchaser thereof, which is denied.

That contention rests on the facts that E. C. Palmer was then the president of a bank tottering in insolvency, and that the firm of E. C. Palmer & Co., of which he was the senior member, was heavily indebted to the bank for overdrafts, and for indorsements held by the corporation. It is in this connection that plaintiffs have taken an immensely wide range in the matter of evidence, with the view to show that Palmer's check of \$8,850, against the pretended balance in his favor as a depositor, was worthless, and particularly of no value to the bank, whose object in disposing of the lottery stock was to realize cash assets to meet the demands of its true creditors and *bona fide* depositors. Continuous efforts were made to show that Palmer was, in truth, a heavy debtor of the bank, whose valuable assets he had fraudulently absorbed; and a detailed history of all the transactions between Palmer and the bank, from the year 1872 to the date of its failure, in 1879, is to be found in the record, and has contributed its share to the innumerable complications which teem in the record, and which we were expected to unravel and to solve.

But, under a correct appreciation of the law which governs the case, the investigation of all these matters, which practically involve the administration of the bank for several years, and its final liquidation, is entirely foreign to the real issues presented by the pleadings in this case.

We hold, in answer to the contention on this branch of the case, that Palmer's individual account as a depositor was entirely distinct from that of his firm, and that, without his consent or special agreement, the debits of the firm could not be compensated or set off against the balance in his favor.

It is elementary in our jurisprudence that "the component parts of a firm are distinct beings from the firm, as well as from each other, and their rights and liabilities must be tested

and adjudicated accordingly": *Paradise v. Gerson*, 82 La. Ann. 532, and authorities therein cited.

Hence flows the principle, equally well settled, that "the lien and the right of set-off exist only where the individual who is both depositor and debtor stands in both these characters alike in precisely the same relation and on precisely the same footing towards the bank. That is to say, for instance, the bank can claim no lien on the deposit of a partner made on his separate account, in order to set off the same against a debt owing them from the firm, and this not even if property specially pledged to the bank by the partner on his separate account afterwards becomes the property of the firm": *Morse on Banks and Banking*, 48.

In the case of *Hancock v. Citizens' Bank*, 82 La. Ann. 590, this general rule was enforced in a case of peculiar hardship, and the doctrine was therein formulated thus: "Compensation does not take place in the confidential contracts arising from irregular deposits, such as the deposit of money with a banker, and the depository is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from him." See also *Gordon v. Muchler*, 34 La. Ann. 604.

Conceding, therefore, that Palmer might have been indebted to the bank on account of his liability for the debts of his firm, it is clear that his indebtedness in that capacity could not have been set off against the balance in his favor on his account as an individual depositor.

We are not to be understood as deciding that, after a thorough settlement of accounts between the bank and the firm, Palmer could have been held as a debtor on account of his firm; we simply eliminate that discussion as irrelevant to the crucial test of his rights under well-settled jurisprudence.

We therefore conclude and we hold that, under the state of his account as a depositor in the bank on the 29th of May, 1879, Palmer had the undoubted right to draw a check of \$8,850 on the bank, and that such check was a legal payment to Mathers, Jr., for his stock. Hence, through that operation, the bank, as pledgee of that stock, obtained full and valid consideration for its interest in the same.

It is conceded that at that time, and for several months before, the stock could not have commanded a higher price on the market, and that the bank was bound, and the directors

clamorous in their eagerness, to sell the stock. But it is contended that Palmer's mode of selling defeated the very object contemplated by the resolution authorizing him to sell, and that under his management the bank did not receive as an asset the proceeds realized from the stock.

The record and the very equities of the case suggest two answers to that contention.

In the first place, Palmer, being, as depositor, a creditor of the bank, could have drawn, on his account, the amount of \$8,850, which the stock sold for, and thus the same result would have been obtained in an indirect manner. And in the second place, the record shows that on the same day he placed in the coffers of the bank the sum of \$9,573.75, the amount of his loan from the People's Bank on the pledged stock.

It is difficult to conceive wherein the bank was injured by the transaction, and wherein she could have been benefited by a restitution to her of the stock on her restoring what she had received, if the stock had not appreciated in value, and much less if it had depreciated, in the mean time.

Manifestly, the bank could not reclaim the stock, because it had been illegally disposed of, without tendering the return of the consideration obtained therefor: *Lacomb v. Forstall*, 123 U. S. 570.

It is doubtless in those or similar considerations that the silence of the bank directors, to whom the whole transaction was known, can and must find its reason.

They knew that the stock could not have commanded a better price, but that it might, on the contrary, have depreciated; they saw that the burdensome indebtedness of Mathers was reduced by \$8,850, and that the credit of Palmer, as a depositor, was reduced in the same proportion. Hence they formulated no complaint and urged no objection, and therefore they must be held, in law, as having ratified the disposition, as illegal as it may have been, made by their agent of their interest in the stock.

By their long inaction, Mathers, the owner, and the bank, as pledgee of the stock, are silenced into a tacit acquiescence of Palmer's dealings touching the subject-matter.

Nothing is better settled in our minds, from the record, that if the stock in question had not increased in value from May to November, 1879, the present suit would never have been filed, and if the same stock has not met with such phenomenal increase of value from December, 1879, to February, 1887,

the suit would have continued to slumber, as it had done for eight years, on the uncalled docket of the civil district court.

As the bank never was the owner of the stock, a serious question might be presented involving the right of plaintiffs to urge the nullity of the sale by Palmer to himself, when it is connected with the silence of Mathers, the owner.

But, for the purpose of our disposition of the case, we have conceded their right as well as their conclusion on that point, preferring to rest our decision on the ratification of the transaction by their silence with knowledge of the facts.

The principle which gives legal effect to acts of an agent, unauthorized by or in violation of his mandate, in consequence of the silence or acquiescence of the principal, is quite familiar in our jurisprudence.

In the case of *Ward v. Warfield*, 3 La. Ann. 468, the agent to whom cotton had been consigned for sale in New Orleans shipped it to Liverpool, where it was sold for account of his principal, at a price less than the market value of the cotton in New Orleans at the date of the shipment to Liverpool. The principal had been notified of the transaction, and had been offered the option of accepting the risk of the venture, or of closing the sale with the agent at the stipulated market value of the cotton in New Orleans at the time. In the mean time the cotton market in Liverpool had depressed, and the cotton was sold there at a reduced price, resulting in a considerable loss from the amount of credits allowed to his principal by the agent, and suit was brought by the latter for the recovery of the difference between the credit thus given and the actual proceeds of the sale of the cotton.

The offer of the agent to take the cotton at its market value in New Orleans remained unanswered for one month, at the end of which time the principal answered that he accepted the offer of purchase by the agent.

But the court held the silence of the principal for one month to be equivalent to an acquiescence in the acts of the agent, and the latter recovered his demand.

The court said: "The principle is well settled that the obligation of an agent whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceed his commission, he renders himself responsible to the principal for the consequence of his act. If loss ensue, it furnishes no defense to him that he intended the benefit of his principal. But while the general doctrine may be con-

sidered as unquestionable, there are other principles which are equally well settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority, and hence, where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. Nor is it necessary that such assent should be express. It may be inferred from the conduct of the principal."

In the case of *Lafitte v. Godchaux*, 35 La. Ann. 1161, this court applied the doctrine under circumstances quite similar to the facts disclosed in the present case.

The pledgee of certain shares of insurance stock had reported to the pledgor a sale thereof under the authority of the act of pledge, and claimed a balance due him on account of his note secured by the pledge, which the pledgors made good. Subsequently, the latter brought suit for the recovery of the stock, on the ground that the pledgee had not truly sold the stock, but had detained the same for his own account.

While the court conceded that the sale made by the pledgee was a nullity, it rejected plaintiff's demand, on the ground of his acquiescence, resulting from long silence after full knowledge of the facts.

It was said in that case: "In such a transaction, the relation of the pledgee to the pledgor is precisely that of an agent to his principal, and the validity of his acts must be tested under the same rules."

"Those rules are well known and firmly established in our jurisprudence, and they hold the acquiescence or long silence of the principal touching an unauthorized or illegal act of his agent as a ratification of the act or contract of the agent." See also *Allison & Co. v. Watson*, 36 La. Ann. 616; *Bennett v. Mechanics' etc. Bank*, 34 La. Ann. 150; *Starr v. Zacharie*, 18 La. 517; *Dupré v. Splane*, 16 La. 51.

The preponderance of the conflicting evidence on this point shows to our satisfaction that the directors of the bank who had authorized and directed the sale of the stock by Palmer, as their agent, had full knowledge of the circumstances under which it was disposed of, including the fact that Palmer had taken it for his own account. Their functions as directors continued until the 30th of June, fully two months after the obnoxious transaction, and yet they did nothing indicating a repudiation of the acts of their alleged unfaithful agent. After

the failure of the bank, their functions were vested in the liquidating commissioners, the present plaintiffs, who avowedly obtained full knowledge of the transaction, and they remained silent until November following, when they began to complain, being prompted, not by the belief that the sale was a nullity *ab initio*, but by the prospects of gain as a result from the rapid increase in value of the stock, which had, in the mean time, doubled in value.

Their case must be held to fall fairly within the rule of acquiescence by long silence.

These considerations lead to and fully justify the conclusion that when this suit was instituted Palmer was the true and legal owner of the stock pledged to the bank by Mathers, and that those who hold under him have acquired a good and indefeasible title to the same. We therefore hold that the judgment in favor of the defendants, Moore, Hyams, & Co., and of the Louisiana Lottery Company, is correct, but that there is error in the judgment against E. C. Palmer.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reversing that portion of the judgment which condemns E. C. Palmer to pay to plaintiffs the sum of \$18,580, with interest, and with a privilege on the forthcoming bond, and by rejecting plaintiff's demand against said Palmer. And it is ordered that, as thus amended, said judgment be affirmed, at plaintiff's costs in both courts.

PARTNERSHIP. — A partnership is a distinct entity, differing from the individuals composing it: *Richard v. Allen*, 117 Pa. St. 199; 2 Am. St. Rep. 652.

PARTNERSHIP. — An individual debt due from one partner cannot be set off against a debt due to the firm of which he is a member: *Cannon v. Lindsey*, 85 Ala. 193; 7 Am. St. Rep. 38; *Rush v. Thompson*, 112 Ind. 156; and compare *Manning v. Maroney*, 87 Ala. 563; 13 Am. St. Rep. 67.

RATIFICATION OF AN UNAUTHORIZED ACT OF AN AGENT may be presumed from the acquiescence of the principal after notice: *Quinn v. Dreebach*, 75 Cal. 169; 7 Am. St. Rep. 138; *Central R. R. & B. Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48; *Hurley v. Watson*, 68 Mich. 532.

**MEYER AND COMPANY v. VICKSBURG, SHREVEPORT,
AND PACIFIC RAILROAD COMPANY.**

[41 LOUISIANA ANNUAL, 689.]

RAILROADS — LIABILITY OF, FOR FIRE FROM ESCAPE OF SPARKS — BURDEN OF PROOF. — In order to recover for loss by fire from the escape of sparks from an engine equipped with the most effective and improved appliances to prevent the escape of fire, the burden of proof is upon the plaintiff, and must be very positive, strong, and convincing, to establish negligence on the part of the railroad company.

RAILROADS — WHEN LIABLE FOR LOSS BY FIRE FROM ESCAPING SPARKS. — Where a railroad company builds a platform at a flag-station, for the purpose of receiving and shipping freight, and under its course of business induces the placing of freight there to be shipped by the next train, a failure on the part of the company to ship at the proper time renders it liable for the subsequent loss of freight on the platform, destroyed by fire escaping from its engines.

Stubbs and Russell, for the appellant.

C. J. and J. S. Boatner, for the appellees.

McENERY, J. V. and A. Meyer, a commercial firm domiciled in the city of New Orleans, sue the defendant company for \$2,536.97, with five per cent interest thereon from legal demand, and the value of fifty-four bales of cotton which had been placed upon defendant's platform at a flag-station for shipment, and which was destroyed by fire while awaiting shipment.

Plaintiffs allege the cotton was destroyed by sparks emitted from one of the engines of the defendant company; that said company was grossly negligent in failing to use on its engines the necessary appliances to prevent sparks from escaping, and that the engine which passed the platform on which the cotton was placed was not supplied with a spark-arrester and improved appliances to prevent the escape of fire; and that said company was also grossly negligent as a common carrier in allowing the cotton to remain on the platform for several days, exposed to fire from passing trains, after having been notified of its storage on the platform for the purpose of shipment by the defendant company.

The defendant company denies each and every allegation of the plaintiff; denies the delivery of said cotton to respondents' agent, or that it had received it in its care or custody; denies that said cotton was burned through any fault or negligence of the company, and affirms that its engines are fur-

nished with improved appliances and operated by experienced, skilled, and careful men.

There was judgment for the plaintiffs for the amount claimed, and the defendant company has appealed.

There is, as usual when questions of fact involving liability are at issue, conflicting testimony.

According to the various impressions of witnesses on the day and at the time when the train passed which it is alleged set fire to the cotton, the wind was from the north or the south, the day was cool, clear, and dry, or it was damp, murky, and misty. But the cotton was piled and stored on the south of the railroad track, and it took fire and burned, notwithstanding the wind blew towards the north, and it was rapidly consumed, although it was a damp day. It took fire almost immediately after the train passed, and upon no hypothesis can the fire be explained from facts in the record, except that it took fire from sparks emitted from the passing locomotive drawing the passenger train.

The engine was provided with a spark-arrester of the most improved kind. With an engine so equipped with effective appliances to prevent the escape of fire, although the authorities are conflicting in the jurisprudence of this country as to the company's liability, we think the weight of authority is, that, where such equipments are applied to engines, the burden of proof is shifted upon the plaintiff, and the testimony must be very positive, strong, and convincing to establish the fact of negligence on the part of the company. Without stating the testimony of the witnesses on this point, its effect is to show that the employees of the road used every precaution to prevent the escape of fire while passing the platform where the cotton was stored.

On the second point presented by plaintiffs, that the defendant company had negligently allowed their cotton, which had been placed upon the platform for shipment, to remain there an unreasonable length of time, which occasioned its destruction and loss by fire, we are of the opinion that the following facts are established by the testimony: That the platform upon which the cotton was placed was located at a flag-station, which had been erected for the convenience of shipping cotton from the King place, upon which the cotton was raised; that the course of business here adopted by the company was the same as at other flag-stations; that the cotton is placed on the platform, the agent is notified, and the train is flagged to

take it on, and at this particular station the agent of plaintiffs would notify the railroad agent in Monroe when a shipment of cotton was to be made, who would cause the train to stop there and take it. He notified the conductor of the next freight train to stop at the station and receive the cotton from the person who had charge of it, to whom the conductor would receipt for the same, and from whom he would receive shipping directions. The plaintiffs' agent, and manager of the King plantation, which they had leased, notified the railroad agent at Monroe, in writing, of his intention to ship the cotton, when it was at the platform, partly on it and a portion on the ground. He sent also a verbal message, which was delivered to the company's agent by one of the company's conductors of a local freight train, on Tuesday morning, the day preceding the fire, of the cotton being at the flag-station ready for shipment. It remained on the platform for at least twenty-eight hours. The plaintiffs had a man at the flag-station to flag the train and to give necessary shipping instructions.

On Tuesday night a freight train passed, and although flagged, failed to stop. No satisfactory explanation is given of this failure to stop and take the cotton, except that it was a through-train, which passes at night, and does not stop at the flag-stations.

Defendant's agent, however, swears, and it is not contradicted, that he usually shipped at night. It is not shown that it was not in the power of the defendant company to transport the cotton from the time it was stored until destroyed. Plaintiffs' gin-house was only a short distance from the station, and it is not reasonable to suppose that they would have risked their cotton from a place where it was insured to one where it was not, without reasonable grounds for believing that it would be immediately placed on defendant's car. The defendant company, by the course of business inaugurated by it, and the special inducements offered to plaintiffs, invited plaintiffs to put their cotton on the platform at the time they did, and it was the duty of the company not to depart from its usual course of business and neglect to take the cotton on the next freight train.

The defendant company alleges that there was no delivery of the cotton to them, and there was no liability on its part, either as warehousemen or carriers.

The company built the platform and provided its own arrangement for the care and protection of freight. It had no

agent there, it is true, but the agent at Monroe was constructively present whenever he was notified that cotton was placed on the platform for shipment, under the course of business adopted by the company, for the purpose of shipment by the next train. The liability of the company to plaintiffs in the present case rests solely on their failure to ship at the proper time. If they had complied with their obligations, the cotton would have escaped destruction.

There were three bales of the fifty-four damaged by the fire. The plaintiffs had a right to abandon them to the company. These three bales were brought to Monroe and tendered to the company's agent, who refused to receive them. The company is liable for their full value, as they have not been accounted for since they were tendered.

Judgment affirmed.

AS TO THE BURDEN OF PROOF IN CASES OF INJURY TO PROPERTY occasioned by fire escaping from a railroad locomotive, see note to *Laird v. Railroad*, 13 Am. St. Rep. 572; note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71, 72. Ordinarily, where fires are shown to have originated with sparks from a railroad engine, negligence on the part of the railroad company is presumed: *Johnson v. Chicago etc. Ry Co.*, 77 Iowa, 666; *Engle v. Chicago etc. Ry Co.*, 77 Iowa, 661; *Saska v. Chicago etc. Ry Co.*, 77 Iowa, 187.

ANDRUS v. BOARD OF POLICE OF OPELOUSAS.

[41 LOUISIANA ANNUAL, 697.]

ESTOPPEL TO DENY CONSTITUTIONALITY OF LAW. — A property holder who has signed a petition for a special tax, who has voted for the ordinance levying the tax, and who has entered into the secure enjoyment of all the benefits contemplated and conferred by the same, is estopped from escaping payment of the tax by urging objections to the constitutionality of such ordinance.

CONSTITUTIONAL LAW — TAXATION. — Constitutional provisions are intended to protect citizens from forced contributions levied *à titium* beyond the powers conferred on the taxing power, but not to protect them from the payment of taxes levied with their free consent and approval, and at their express request.

FRANCHISE — APPEAL BOARD. — A member of the board of police of an incorporated town is a competent surety for the board in its corporate capacity on a bond of appeal.

W. C. Perrault, for the appellants.

Kenneth Baillio, for the appellee.

FENNER, J. Plaintiff enjoins the sale of his property for a special tax levied under an ordinance of the town of Opelous-

sas, on the ground that the ordinance levying said tax is illegal and unconstitutional.

The defendant opposes a plea of estoppel and a general denial. The plea was referred to the merits, and after trial, the justice of the peace overruled the plea, and gave judgment in favor of plaintiff, perpetuating the injunction, and declaring the tax illegal and unconstitutional.

The record discloses the following facts:—

In March, 1886, the court-house in Opelousas was destroyed by fire. Thereafter, a formidable movement was inaugurated to secure the removal of the parish seat to the rival town of Washington. As such removal required future legislative action and a vote by the people, it became the obvious interest of those favoring the removal to induce the police jury to postpone the rebuilding of the court-house until such action and vote could be had, while, on the other hand, the people of Opelousas were vitally interested to secure the immediate rebuilding.

To induce such immediate action, the Opelousas people offered to aid the police jury in the rebuilding by a subscription of eight thousand dollars, to be raised by the imposition of a special tax of twenty-five mills on all the taxable property of the town.

To make good this offer, a petition was prepared, addressed to the board of police of Opelousas, praying for the levy of such tax, which petition was signed by more than the proportion of tax-payers in number and value required by the provisions of acts 41 and 126 of 1882.

Acting upon such petition, the board of police passed an ordinance levying the tax as prayed for, and caused the same to be submitted to the vote of the tax-payers, in pursuance of the legal requirements on the subject. At the election, 125 votes were cast,—123 in favor and only two against the tax.

After official proclamation of the approval of the tax by the voting tax-payers, the police jury of the parish, acting in consideration and upon the faith of said tax, entered into the contract for the immediate rebuilding of the court-house, and the admirable structure in which this court is now sitting is the result.

The present plaintiff signed the petition for the tax, and voted for the ordinance levying the tax. He had previously been one of the numerous citizens who, in order to influence the police jury, had signed and presented a document pledg-

ing themselves to support and vote for the ordinance levying the tax.

Plaintiff is a property holder and large merchant in the town of Opelousas. The evidence is clear that the removal of the parish seat would have been gravely injurious to the value of the property in the town, and to its trade and business; that the peril of such removal was serious; that this peril was averted by the building of this expensive courthouse; and that the voting of the tax was the direct and necessary inducement on which the police jury acted in its prompt erection.

And now, after thus actively co-operating in securing the levy of this tax, and after he has entered into secure enjoyment of all the benefits contemplated and conferred by the same, he seeks to escape payment of the tax by urging objections to the legality and constitutionality of the very ordinance which he petitioned the board to pass, which he pledged himself actively to support, and which he actually voted for.

It is perfectly clear that he is estopped from urging such objections. All authorities accord in maintaining estoppel in such a case.

Cooley says: "It sometimes happens that a party who complains of illegal taxation has been so connected with the proceedings in voting, levying, or collecting the same that it would be unjust and inequitable to others, or to the public, that any remedy should be given him in respect to the illegality. Such a case would exist if one in respect to some interest of his own should petition for or otherwise actively encourage the levy of the tax of which he subsequently makes complaint": Cooley on Taxation, 819.

Bigelow says: "This doctrine [of estoppel] has been held to apply to the case of persons who had procured the passage of an act of the legislature under which they had acted and obtained advantage, and the parties were thereafter held estopped to show that the act was unconstitutional, though it had been so pronounced by the courts to those who had not participated in its passage": Bigelow on Estoppel, 509.

Burroughs says: "It is a principle well recognized that all who aid in procuring an act of the legislature, or who ratify it after its passage, are bound by it. . . . The principle requires the assent of those who are to bear the burden; if a number of citizens procure an enabling act to allow a city to subscribe to the stock of a railroad, it binds those who procure

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it and those who ratify, but those who do not assent to it are not bound." And again: "If a majority vote for a subscription or ratify an enabling act, it undoubtedly binds the majority; but how about the minority?" Burroughs on Taxation, sec. 38.

The learned authors referred to support the doctrine by reference to numerous judicial decisions.

The plaintiff in this case is not affected by the unconstitutionality of this tax, if it be unconstitutional. The provisions of the constitution are intended to protect the citizens from forced contributions levied *in invitum* beyond the powers conferred on the taxing authorities.

As to plaintiff, this tax is not a forced contribution, independent of his own will, but is one levied with his free consent and approval, and at his express request. Hence his attempt to avoid the effect of the estoppel by pleading error based on his ignorance that the ordinance was unconstitutional is of no avail. It is of no consequence to him if some tax-payers should escape payment of this tax; that will not increase the burden which he voluntarily assumed, nor will it in this case diminish, in the slightest degree, the benefit he receives.

We must not be understood as making the slightest intimation of an opinion that this tax is illegal or unconstitutional. The question of estoppel precedes the issue on the merits of the case, and, in logical order, required anterior decision. Having maintained the estoppel, that ends this case.

It is therefore ordered and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now decreed that there be judgment in favor of defendant, dissolving the injunction, and rejecting plaintiff's demand, at his cost in both courts.

Judgment reversed.

ESTOPPEL. — Tax-payers may be estopped to deny the validity of tax proceedings, where they made no objection to a tax voted in aid of a railroad: *Johnson v. Kessler*, 76 Iowa, 412. But a tax-payer is not estopped to deny the validity of a grand list by the fact that he was chairman of the selectmen, and made the tax-bill from the grand list, and put it into the hands of the collector: *Lynde v. Dummerston*, 61 Vt. 48.

MCGOWEN v. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

[41 LOUISIANA ANNUAL, 732.]

RAILROADS—RULES AND REGULATIONS.—Railroad companies have the right to adopt reasonable rules as to the method of paying fares by passengers, and to discriminate between fares paid in the cars and at stations, and to remove from the cars, in a proper manner and at a proper place, persons who refuse to comply with such regulations.

RAILROADS—RULES AND REGULATIONS.—A railroad regulation, requiring passengers who do not procure tickets before the commencement of the journey to pay an extra amount of fare, and providing that a coupon shall be given the passenger on which he may collect the extra fare from any agent at a station, and exempting from its operation such passengers as board the trains at stations where tickets are not sold, is reasonable and valid.

D. Caffery, for the appellant.

L. O. Hacker, and Foster and Ments, for the appellee.

FENNER, J. There is no dispute as to the substantial facts of the case. The suit is for damages for wrongful ejection of plaintiff from the cars of defendant on which he was a passenger. Plaintiff, having failed to purchase a ticket at the station where he entered the car, tendered the conductor the regular rate of fare to his point of destination, which the conductor refused, and demanded twenty-five cents additional, and upon plaintiff's refusal, he was ejected from the car. No serious complaint is made as to the manner or place of the ejection. These were civil and reasonable, unaccompanied by unnecessary violence. The question is as to the right of ejection itself.

The defendant company sets up, as its justification, a regulation, adopted by its management, requiring passengers to procure tickets before boarding the train, or, in default, to pay twenty-five cents extra, for which extra charge a drawback or duplex coupon was given, collectible from any agent at any station of the line.

This regulation had been in force for a number of years, and printed notices of it had been posted in every coach and in every office of the company.

We think it is no concern of plaintiff how the corporation acted in adopting this regulation. The corporation is shown to have published and acted on it for eight years, and it sanctions it by its pleading in this case. It must be treated as a

regulation of the corporation, and the only question is as to its legality and reasonableness.

The question is by no means new. We consider it well settled that railroad companies have the right to adopt reasonable rules as to the method of paying fares by passengers, and to discriminate between fares paid in the cars and at stations, and to remove from the cars, in a proper manner and at a proper place, persons who refuse compliance with such regulations: *Redfield on Railways*, 98, 112; *Hutchinson on Carriers*, 459; *Thompson on Carriers*, 341; *Am. & Eng. R. R. Cas.* 287.

Mr. Hutchinson says: "It has been repeatedly held that a regulation or by-law is not unreasonable which provides that when tickets are not procured before the commencement of the journey, which puts the company to the inconvenience of collecting from the passenger his fare during the progress of the journey, the price of this carriage shall be more than would have been charged for the ticket, and that upon refusal of the passenger to pay the higher fare, he shall be ejected. And if adopted in good faith, and with a view to facilitate the business of the carriers, there can be certainly nothing unreasonable or unjust in such rules": *Hutchinson on Carriers*, 459.

The reasonableness of requiring passengers to procure tickets before entering the cars, as saving the time and trouble of conductors in taking fares and making change, which would be almost impracticable where the travel was large and the stoppages frequent, is certainly patent; and the enforcement of such requirements, by regulations making it to the interest of passengers to comply with them, and recouping the company for the extra service imposed on the employees by neglecting them, is the only practicable method of enforcing them.

We think the regulation here involved is both uniform and reasonable. Counsel for plaintiff assails its propriety on several grounds:—

1. That it requires the passenger to pay the same amount extra, without regard to the amount of his regular fare. The inconvenience to the carrier resulting from the failure to buy a ticket is the same whether the distance traveled be long or short, and as this is the ground of the extra charge, the uniformity seems eminently just.

2. He complains that the regulation is enforced as against passengers boarding the train at certain stations, and not at others. But the only stations exempted are those at which

there are no offices for the sale of tickets. What could be more just?

3. He says the extra amount is not properly an extra charge, but a forced loan levied on the passenger. If the company would have the right to exact the extra fare, surely the passenger is not injured because it repays it to him.

4. He says it is evident the regulation does not diminish the inconvenience occasioned to the conductor, but increases it, because, under it, not only has the conductor to make change, but he incurs the additional trouble of furnishing the return coupon. This is true as to each particular case, but the object and effect of the regulation is to diminish the number of cases, which it undoubtedly accomplishes.

We think plaintiff's action has no legal foundation.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is now adjudged and decreed that there be judgment in favor of defendant, and rejecting plaintiff's demand, at his cost in both courts.

CARRIERS. — REGULATIONS AND RULES reasonable in their nature may be adopted and enforced by railway carriers respecting fares and tickets: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note; *Pool v. Northern P. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289; *N. & W. R'y Co. v. Wyser*, 82 Va. 250. And the carrier may discriminate between fares paid upon the train and fares paid at the ticket-office: *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103, and note; *Wilsey v. Louisville etc. R. R. Co.*, 83 Ky. 511; *State v. Hungerford*, 39 Minn. 6; *Wright v. California etc. R'y Co.*, 78 Cal. 360.

WALKER v. VICKSBURG, SHREVEPORT, AND PACIFIC RAILROAD COMPANY.

[41 LOUISIANA ANNUAL, 795.]

RAILROADS — DUTY TO STOP AT STATION — CONTRIBUTORY NEGLIGENCE OF PASSENGER IN JUMPING FROM MOVING TRAIN. — While a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such station without stopping does not justify the passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the company; and the voluntary act of the passenger in so jumping, in the absence of such invitation, and of impending danger or necessity, is such contributory negligence on his part as will defeat his right of recovery.

T. J. Kernan, and Farrar, Jonas, and Kruttschnitt, for the appellant.

Watkins and Watkins, for the appellee.

FENNER, J. The following are the facts disclosed by the record:—

On the 16th of October, 1886, plaintiff was a passenger on defendant's train, having purchased a ticket from Bodeau Station to Doylene Station. The latter is a flag-station, at which trains do not stop unless they have a passenger to put off or take on. If a signal is given from the station that there are passengers to get on, the engineer blows two whistles, to signify intention to stop. If there are passengers to put off, the conductor notifies the engineer by pulling the bell-rope, and the engineer, on receiving such signal, blows two whistles, to signify the same intention. If there are no passengers to take on or put off, only one whistle is blown, and the train does not stop, but simply slackens speed to a rate of eight or ten miles an hour in passing the station, to enable the mails to be thrown on and off.

On this occasion, the train had been compelled to come almost to a stop about two hundred yards from Doylene, on account of some oxen which were on the track. It then moved forward again, and the conductor, knowing he had this passenger to put off, attempted to signal the engineer with the bell-rope, but, owing to some tangle or disarrangement, could not do so. Consequently, the two whistles were not blown. The conductor, the engineer, and the porter all agree on this point, and that is no contradicting statement.

The porter only calls out flag-stations when there are passengers to put off, and the signal to stop is blown. The plaintiff testifies that the porter did pass through the car and call out Doylene Station, but this the porter positively denies, and considering the uncontradicted testimony that no signal to stop was given, the fact is of little importance.

The consequence was, that the train passed by the station, only slacking its speed, as customary, but not stopping.

The plaintiff, having several times made this trip, and knowing his station, went out on the platform for the purpose of getting off. He went down on the steps of the car, and after passing a little beyond the station platform, seeing that the car did not stop, and, as he says, supposing that it was intended that he should get off, and that he could do so with safety, he stepped off while the train was moving, and he says that as he was in the act of doing so, the train accelerated its motion, giving a sudden jerk, which threw him and broke his

ankle, occasioning the injuries for which his present action in damages is brought.

He says that, just before he stepped off, some one called to him: "Is not this your station?" which acted in determining him to step off; but the evidence leaves no doubt that the person who asked the question was not any employee of the company.

The conductor says that, having failed to give the signal, he went through the train after passing the station, to find plaintiff, intending to back the train up to the station and put him off, but failed to find him, and supposed he had gotten off when the train had stopped on account of the oxen on the track.

Under these facts, the fault of the company in not stopping its train cannot be disputed. It was bound under its contract to stop and safely discharge its passenger.

But did its negligent failure to discharge this duty justify the plaintiff in jumping off the moving train, or absolve him from the charge of contributory negligence, which, under the settled jurisprudence of this court, is a bar to his recovery?

We consider the law to be settled by the overwhelming weight of authority that while a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such a station without stopping does not justify the passenger in jumping off the moving train, unless expressly or impliedly invited to do so by the company.

A leading case on the subject, which we select from a multitude of authorities, not only on account of the great lawyer who delivered it,—Judge Black,—but also because it has been expressly quoted and affirmed by this court, lays down the principle, in a state of facts strikingly similar to those before us, as follows: "The plaintiff below was a passenger in defendant's cars from Philadelphia to Morgan's Corner. The train should have stopped at the latter place, but some defect in the bell-rope prevented the conductor from making the proper signal to the engineer, who therefore went past, though at a speed somewhat slackened on account of some switches there to be crossed. The plaintiff, seeing himself about to be carried on, jumped from the platform of the car, and was seriously injured in the foot. . . . Persons to whom the management of a railroad is intrusted are bound to exercise the

strictest vigilance. They must carry the passengers to their respective places of destination and set them down safely, if human care and foresight can do it. . . . But they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness and folly. . . . From these principles it follows very clearly that if a passenger is negligently carried beyond his station, where he had a right to be let off, he can recover compensation for the inconvenience, the loss of time, and the labor of traveling back, because these are the direct consequences of the wrong done to him. But if he is foolhardy enough to jump off without waiting for the train to stop, he does it at his own risk, because this is gross imprudence, for which he can blame nobody but himself": *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 823.

This court long ago laid down the like doctrine in the following language: "If the daughter of plaintiff voluntarily jumped from the cars while in motion, even though it was the constant habit of the company to stop at that place, the leap not being made to avoid an imminent impending peril produced by the misconduct of defendants, but to avoid being carried beyond her place of destination, she was herself guilty of such imprudence as relieves the company from the consequences of the want of caution on the part of their servants; for in such a case the accident may be attributed to the fault of both parties, which would destroy plaintiff's right to recover." And then the court quotes with approval the above decision of the Pennsylvania court: *Dumont v. New Orleans etc. R. R. Co.*, 9 La. Ann. 441.

In a very recent case we referred to this principle as an evident one, saying: "Now, supposing that any passenger on a regular train should labor under a similar mistake in believing, for instance, that the train was passing by the station to which he was destined, and, fearing that he might be carried beyond the same, should jump out as the train was pulling out of the station, and be injured by falling, could the company be held liable for injuries thus received? Evidently not."

In the multitude of adjudications and judicial expressions on this subject by numerous courts there have naturally arisen varieties and conflicts of opinions, and decisions hostile or apparently hostile to each other are quoted on either side; but the weight of authority undoubtedly sustains the views above

expressed, and at all events, what more nearly concerns us, they have been adopted in the jurisprudence of Louisiana.

The question is, then, whether the plaintiff, in jumping off the moving train, acted upon the express or implied invitation of the company.

The evidence conclusively negatives any express invitation on the part of any employee of the company. It is equally clear that the officers in charge of the train never intended or expected that plaintiff should get off, and certainly did not slack up for the purpose of letting him get off. They acted precisely as they would have done had there been no passengers to take on or let off; for the engineer had no signal to that effect, therefore did not know that there was a passenger to put off, and only slackened the speed, as was his duty on all occasions, simply to allow the exchange of mails. Is it possible to construe this as implying an invitation? If so, such an invitation is given to every one who wants to get off the train, whenever it passes such a station.

The testimony is conflicting as to the rate of speed at which the train passed the station. Nothing can be more uncertain than such estimates, especially when made by unskilled observers. The natural and probable conclusion from the circumstances is, that the train only made the usual slacking of speed for exchanging the mails. There was no reason why the engineer should have acted otherwise. Plaintiff thinks he would have landed safely but for the acceleration of speed which took place as he was in the act of jumping. But this acceleration only took place after the train had passed the platform, and after the mails had been exchanged, which was the usual and natural course.

If plaintiff chose to infer an invitation to jump off from these customary acts of the company, it was a rash conclusion. One of his own witnesses testifies that he never, at any other time, saw a person jump from a train moving as fast as that one was, although he says it was moving slowly.

That plaintiff's action was imprudent is shown by the result, and, as we think, by all the circumstances. His own evidence shows that he hesitated about attempting the jump, and was only determined by the question of a third person, and the thought that otherwise he would be carried beyond his station. His act was purely voluntary, uninfluenced by any invitation expressed or intended by the employees of the company, and excused by no impending danger or necessity

of any kind, except his mere unwillingness to be carried beyond his station. It was imprudent and dangerous, and his action for the resulting injury is clearly barred by his own contributory fault.

It is therefore ordered and decreed that verdict and judgment appealed from be annulled and set aside, and that there be judgment in favor of defendant, rejecting the demand, at plaintiff's cost in both courts.

WATKINS, J., dissented, and observed that the opinion of the court as adopted "does not state that the plaintiff was not impliedly invited to leave the train, but there was no express invitation on the part of any employee of the company, and that the officers in charge never intended or expected him to leave. This dicta is the sole foundation of the opinion, and the legal proposition announced rests exclusively upon *Dumont v. New Orleans etc. R. R. Co.*, 9 La. Ann. 441; *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *Reary v. Louisville etc. R. R. Co.*, 40 La. Ann. 32; 8 Am. St. Rep. 497." In *Dumont v. New Orleans etc. R. R. Co.*, 9 La. Ann. 441, none of the facts were stated, and the only question discussed was the correctness of the charge of the trial judge, the case being remanded for a new trial. In this case, the authorities cited and relied upon were *Lesseps v. Railroad Co.*, 17 La. 362; *Fleytas v. Railroad Co.*, 18 La. 339. In these cases, the question involved related to damages sustained by the owners of slaves killed either while attempting to cross a railroad track or while drunk or asleep thereon. The citation of these cases as authority for deciding that case only shows how imperfectly the question involved was understood at the time that it was decided, for the reason that there were no contract relations between the slaves and the railroad company, and the former were, primarily, guilty of gross negligence, while the latter was without fault.

The opinion as adopted in the principal case quotes with approval a paragraph from the case of *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323, which recites no part of the facts of that case. These facts are found in Wood's Railway Law, pages 1130 and 1131, and are here quoted to show their entire inapplicability to this case. They read as follows: "Whilst the train was in motion, the plaintiff leaped from the car, though warned by the conductor and brakeman not to do so, and who informed him that the train would be stopped and backed to the station. If he had heeded them, he would have been safely set down at the place he desired to stop at in less than a minute and a half. Instead of this, he took a leap which promised nothing but death; for it was made in the darkness of midnight, against a wood-pile close to the track, and from a car going at the full rate of ten miles an hour." It is beyond comprehension why these decisions are cited in this case as sustaining the doctrine of contributory negligence, as the record presents no such case.

The case of *Reary v. Louisville etc. R. R. Co.*, 40 La. Ann. 32, 8 Am. St. Rep. 497, is not applicable, as that was the case of one who, while not a passenger, jumped from a moving train. The conductor of the train at the time had gone home, leaving his train in the depot-yard, and uncoupled; and the quotation from that case was hypothetically stated merely as illustration, and has no weight as part of that decision.

Judge Watkins, before beginning a general discussion of the authorities and rules of law which, in his opinion, ought to control in this case, gives the following as the facts: When plaintiff was within two hundred yards of the station of his departure from the train, its speed was slackened for the purpose of driving off a yoke of oxen which were on the track. Subsequently, its speed was increased, the whistle blown, the speed again decreased, and the train slowly moved past the station while the mails were being exchanged. When the train was passing the station, plaintiff thought its speed slow enough for a man to alight without danger; and the only thing that prevented him from alighting in safety was, that the train was started with a sudden jerk forward as he attempted to get off. Though the train was moving all the time, its rate of speed was very slow, and the place where plaintiff attempted to alight was a better place to get off than where persons usually left the train, the ground being much smoother, and the train moving at less than one half its usual speed. As he hurriedly made up his mind, the train passed an open place, and he got off, thinking it a better and safer place than at the platform, where ties and other material were lying, and that he could alight with perfect safety to himself. All the evidence on the part of the plaintiff went to show that the train was moving very slowly, in fact much slower than usual, and that as he attempted to alight, the motion of the train was increased with a jerk. There was no positive evidence on the part of defendant in denial of these facts, and they clearly take the case out of the operation of the principle announced in *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323. They show inexcusable negligence on the part of defendant. The question remaining is, whether there was such contributory negligence on the part of plaintiff as will preclude his right to recover; and to determine this question, a review of the authorities will be necessary.

The supreme court of Tennessee decided in 1877 that the act of a passenger in alighting from a train while moving slowly, and who thereby sustained injuries, has been treated by the courts of the several states as negligence *per se*, and no damages can be recovered. "But," says the court, "this is contrary to the current of judicial authority in this country at least. The true rule deducible therefrom is stated in 2 Wood's Railway Law, 1130 et seq. 'In all cases the question is one of fact, whether, in view of particular circumstances, the passenger was guilty of negligence in attempting to leave the train while it was in motion. In this, as in reference to all other matters when the safety of the passenger is concerned, the company owes a duty to the passenger to act with proper caution and care; and if the motion of the train is not entirely stopped, and the passenger is expressly or impliedly invited to leave the train while moving at a slow rate of speed, he has the right to presume that it is safe for him to do so, etc. . . . If the train is moving slowly, and there is no obvious danger in getting off, it cannot be said to be negligence *per se* to make the attempt, especially if the passenger is directed to do so. . . . And it would be error to instruct the jury that such attempt *per se* constituted contributory negligence': 2 Wood's Railway Law, 1129. As a rule, it may be stated that when a passenger by the wrongful act of the company is compelled to choose between leaving the cars when they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, the company is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably: 2 Wood's Railway Law, 1131, 1132; Thompson on Carriers, 227-267; *Plopper v. New York Central etc. R. R. Co.*, 13 Hun, 625; *Keating v. New*

York Central etc. R. R. Co., 49 N. Y. 673; *Taber v. Delaware etc. R. R. Co.*, 71 N. Y. 489."

"The earlier cases," says the Tennessee court, "established the rule that leaving the train whilst in motion was such negligence as defeated the right of recovery, unless done to avoid danger of remaining on board; and this is still stated as the general rule in many of the authorities: 2 Wood's Railway Law, 1126; Thompson on Carriers, 267. But the rule we have laid down is the modern one, formulated from the many exceptions, and this modification has been recognized in this court: *East Tennessee etc. R. R. Co. v. Connor*, 15 Lea, 238; *Louisville etc. R. R. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840." Judge Watkins then says: "Thus it is stated on the highest authority that when a passenger is impliedly invited to leave a train, not by the officers of the train, but by surrounding circumstances, while moving at a slow rate of speed, he has a right to presume that it is safe to do so. But the opinion states that such an act was but 'rash' and 'imprudent,' because it 'was purely voluntary, uninfluenced by any invitation expressed or intended by the employees of the company.'"

The supreme court of Georgia decided in a recent case that "the railroad was bound to put a passenger off; to stop its train for this purpose. This it failed to do, and it was not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted": *Georgia R. R. etc. Co. v. McCurdy*, 45 Ga. 288; 2 Am. Rep. 577; *Filer v. New York etc. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Lloyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509; *Illinois etc. R. R. Co. v. Able*, 59 Ill. 131. "But generally no recovery can be had if the cars are under such motion as to render it obviously dangerous for a person to attempt to leave them. When the danger is apparent, it must not be braved simply because the company is bound to stop the train, or because it is very important that the passenger should stop at that particular place": *Georgia R. R. Co. v. McCurdy*, 45 Ga. 289, citing 2 Wood's Railway Law, 1136; *Chicago etc. R. R. Co. v. Hamard*, 26 Ill. 373; *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; 5 Am. Rep. 60. 2 Wood's Railway Law, pages 1137, 1148, thus concisely states the rule: "But in all cases, the question of liability must necessarily be determined by the facts and circumstances of each case, whether the train was in rapid motion, and whether the real danger was obvious." "But when a railway company fails to bring its train to a full stop at a station, it is liable in damages for injuries sustained by a passenger in attempting to get off, if, under all the circumstances, it was prudent for him to make the attempt": 2 Wood's Railway Law, 1143, 1149; *Price v. St. Louis etc. R. R. Co.*, 72 Mo. 414; *Centra! R. R. Co. v. Letcher*, 69 Ala. 106; *Chicago etc. R. R. Co. v. Houston*, 95 U. S. 297; *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376.

The rule is stated in 2 Abbott's Law of Corporations, page 598, to be as follows: "Alighting from a car at an unsuitable place is not contributory negligence, if the train is not stopped at a suitable place, and if there is not such apparent danger as would deter a person of ordinary prudence." Beach on Contributory Negligence, page 157, section 53, announces the rule to be "as in the case of boarding a railway train in motion; so it is held not contributory negligence *per se* for a passenger to jump off a train whilst it is moving"; citing *Lloyd v. Hannibal etc. R. R. Co.*, 53 Mo. 509; *Gabeston etc. R'y Co. v. Smith*, 59 Tex. 406; *Penn. R. R. Co. v. Elgore*, 32 Pa. St. 292.

"Whether or not a railway company shall be held in damages for injuries sustained by a passenger in attempting to leave one of its trains whilst in

motion will depend upon whether, under all the circumstances, it was prudent for him to make the attempt"; citing, among other cases, *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; *Price v. St. Louis etc. R. R. Co.*, 72 Mo. 414; *Langhoff v. Milwaukee etc. R. R. Co.*, 19 Wis. 515; *Parish v. Eden*, 62 Wis. 272; *Leavitt v. Chicago etc. R. R. Co.*, 64 Wis. 228; *St. Louis etc. R. R. Co. v. Person*, 49 Ark. 182; *St. Louis etc. R. R. Co. v. White*, 48 Ark. 495; *Louisville etc. R. R. Co. v. Mask*, 64 Miss. 738; *Hunter v. Cooperstown etc. R. R. Co.*, 112 N. Y. 371.

In *Solomon v. Manhattan R'y Co.*, 103 N. Y. 437, the rule is laid down that, to justify a recovery, the act of the defendant "must put the passenger to a sudden election between alternative danger or inconvenience, or create some situation which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety." His honor cites the following cases as maintaining and upholding the doctrine for which he contends: *Collins v. Davidson*, 19 Fed. Rep. 83; *Hoff v. Railway Co.*, 14 Fed. Rep. 558; *South Covington etc. R'y Co. v. Ware*, 84 Ky. 267; *Lawrence v. Green*, 70 Cal. 417; *Chicago etc. R'y Co. v. Miller*, 46 Mich. 532; *Cincinnati etc. R. R. Co. v. Carpenter*, 112 Ind. 28; 2 Am. St. Rep. 144; *Stewart v. Boston etc. R. R. Co.*, 146 Mass. 605; *St. Louis etc. R. R. Co. v. Person*, 49 Ark. 182. In *Strand v. Chicago etc. R'y Co.*, 64 Mich. 216, a rule is formulated in the following language: "In order to make him negligent, he must, as in all other cases, decide upon the facts as they appear as a man of ordinary care would do under similar circumstances. It is not the right of the passenger to run against evident risks to his safety, but the rule of prudence binding on him must be that which under just such circumstances would restrain all men of ordinary prudence. If the mind of an ordinarily prudent man would be impressed with the belief of danger, he has no right to incur that danger. If the danger would not be apparent, he is not negligent in acting on that assumption." Remarking that an indefinite number of cases might be cited in support of his view, Judge Watkins insists that the following rules are firmly fixed in American jurisprudence: "1. That it is not *per se* negligence on the part of a passenger to alight from a moving train. 2. The question is one of fact whether under the particular circumstances the passenger was guilty of negligence in attempting to thus alight; and if it appear that he was not expressly or impliedly invited to leave the train while running at a slow rate of speed by the employees of the train, but was by surrounding circumstances, he has the right to presume that it is safe for him to do so. 3. When a passenger by the wrongful act of a railroad company is compelled to choose between leaving the cars while they are moving slowly, or submitting to the inconvenience of being carried by the station where he desires to stop, it is liable for the consequences of the choice, provided it is not exercised negligently or unreasonably, and it is not want of ordinary care in the passenger to use the only means to get off the course of the defendant permitted. 4. To justify a recovery, the act of the company must put the passenger to a sudden election between alternate danger or inconvenience, or create some situation which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety. 5. It is the duty of the passenger to exercise his own judgment; and if the danger was so great that a man of ordinary prudence would not have attempted it, he is guilty of such contributory negligence as bars recovery; for, when the danger is apparent, it must not be braved simply because the company is bound to stop the train, or because it is very

important that the passenger should stop at a particular place; but in all cases the question of liability must depend upon whether the train was in rapid motion and the danger obvious, the question being whether, under the circumstances, it was prudent in the passenger to make the attempt to alight; and that depends upon whether the danger was imminent and obvious. I therefore respectfully submit that the mere fact of the plaintiff having attempted to alight from defendant's train while in motion did not constitute his act contributory negligence because it was voluntary and without an invitation, express or implied, on the part of the company's employees. The act of the company put the plaintiff to a sudden election between alternative danger or inconvenience, and thus created a situation well calculated to divert his attention from that danger, and inspired a confidence in the safety of his attempt to alight therefrom. The danger does not appear to have been either apparent or imminent. I think the verdict of the jury and the judgment of the court should have been affirmed."

In view of the amount of litigation involving the question as to the passenger's contributory negligence in alighting from a moving train, we deem it of importance to add the substance of the more recent cases not cited in the dissenting opinion given above. In the well-considered case of *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, the rule is announced, which we believe is now universally sustained by all the late cases, that the act of a person who is a passenger in alighting voluntarily from a moving train is not negligence *per se*, nor does it raise a conclusive presumption of negligence on his part. The rate of speed at which the train is moving, the place, and all the circumstances connected with the alighting, are to be taken into consideration in determining whether or not he was guilty of negligence in leaving or attempting to leave the train. This case cites many of the important cases sustaining this rule, and we may add *New York etc. R. R. Co. v. Coulbourne*, 69 Md. 360; 9 Am. St. Rep. 430; *Nance v. Carolina etc. R. R. Co.*, 94 N. C. 619. The cases upholding this doctrine generally consider that the question is one of fact, to be determined by the jury, under all the circumstances of each particular case: *Raben v. Central Iowa R'y Co.*, 74 Iowa, 732; *Atlanta etc. R. R. Co. v. Smith*, 81 Ga. 620; *Pennsylvania R. R. Co. v. Lyons*, 129 Pa. St. 113; *Pennsylvania R. R. Co. v. Peters*, 116 Pa. St. 206. It is culpable negligence on the part of a railroad corporation not to stop its train at a regular station to which it has sold a ticket, and give a passenger opportunity and time to alight. It is also negligence for its officers to induce the passenger to leave the train while in motion. On the other hand, it is not negligence *per se* for the passenger to leave the train while in motion. If he is given to understand by surrounding circumstances that he can get off in safety, he is justified in making the attempt. Therefore, in an action to recover damages, where the passenger is injured in attempting to leave the train while in motion, if evidence is given tending to show such circumstances, the question of contributory negligence is one for the jury to determine as a matter of fact: *Bucher v. New York Central etc. R. R. Co.*, 98 N. Y. 128.

A passenger, under all circumstances, must exercise the care of a prudent man, and not rush heedlessly into obvious and apparent danger; and whether it was imprudent and careless to attempt leaving the car while in motion depends upon the circumstances, as where a party by the wrongful act of another has been placed in circumstances calling for an election between leaving the car or submitting to an inconvenience and further wrong, it is a proper question for the jury, whether it was a prudent act or whether it was

a reckless exposure of the person to peril: *Taylor v. Missouri etc. R. R. Co.*, 26 Mo. App. 336, where it is said: "Defendant was in the habit of carrying passengers to that point on this train; it had carried plaintiff before. This time plaintiff was in sore need of stopping; he had left his family sick, and his attention was needed. Defendant, to suit its own convenience, without caring for plaintiff's situation, refused to stop the train, but slowed up to the pace of the ordinary trotting of a horse and buggy. Plaintiff felt that he should not be carried to the next station, where he would be compelled to remain overnight, and stepped from the train. His was not a wanton and causeless act committed by an indifferent person. While he had cause for his anxiety to get off, and while it was his right to be put off at that point, yet these would not justify him in reckless conduct. He must act as an ordinarily prudent and careful man would under similar circumstances; and whether he did so act, under the circumstances, was properly left to the jury."

Stepping from the platform of a railroad car while in motion, in the face of obvious danger, or when there is no reasonable necessity, real or apparent, is such contributory negligence as will defeat recovery for damages for injuries sustained. A passenger arose from his seat in the car when the train stopped at the station, and went toward the door, and, upon being told by the porter that the train, which had started again, and was moving at the rate of about three miles an hour, would not stop again, stepped from the steps of the car to the ground, in the direction in which the train was moving, fell, and broke an arm; he is not guilty of contributory negligence as matter of law. The question should be submitted to the jury whether, under all the circumstances, his act was that of a reasonably prudent man: *Central R. R. etc. Co. v. Miles*, 88 Ala. 256. The court, in this case, said: "In determining whether there was contributory negligence, the fact that there was a bell-rope, and plaintiff's omission to resort to it to stop the train, should not be selected, and accorded conclusive or controlling force, but only the weight to which it is entitled on a consideration of its connection with the other facts, and of the relative bearing and influence of all attendant circumstances, each upon the other. Another and material element of consideration is the effect upon the mind of the plaintiff, produced by the failure of defendant to discharge the unquestionable duty to stop the train long enough to permit him, by the use of due diligence, to get off with safety, and by starting it while he was in the act of leaving the train. By the fault or neglect of defendant's agents he was placed in a situation that compelled him to choose between the delay, trouble, and inconvenience of being carried beyond his stopping-place, and attempting to step off. The wrongful conduct of the company, whereby plaintiff was subjected to an election between two such courses to be pursued, must be taken into consideration: *Johnson v. West Chester & P. R. R. Co.*, 70 Pa. St. 357. There is a recognized distinction between the cases where the company is and where it is not in fault. The argument that if plaintiff had remained on the train he would not have been injured, and would have had a right of action for having been carried on, does not, under the circumstances of this case, evoke favorable consideration. Stopping the train at Inverness was tantamount to a direction to the plaintiff to get off, and an assurance that reasonable time would be allowed for that purpose. The general rule, established by the weight of authorities, is, that where the train is stopped at a station to which the company contracted to carry a passenger, the company is liable, if a reasonable time to leave is not afforded, and he is injured in the attempt to alight after it is started, and while in

motion, if he does not, in getting off, incur a danger obvious to the mind of a reasonable man: 2 Am. & Eng. Ency. of Law, 762. But, notwithstanding the company may be in fault, a passenger is not justified, in order to avoid being carried beyond his stopping-place, to defy obvious danger, such as an attempt to jump from a train in rapid motion. But an attempt for such purpose is not negligence, in law, if the train was stopped but a reasonable time, and is moving so slowly that to alight from it would not appear dangerous to a man of ordinary prudence. The plaintiff may or may not have been negligent. Whether negligent or not depends upon the attendant circumstances, — the manner in which he descended from the steps of the car and stepped off, the rate of speed at which the train was running, the character of the ground, the situation, and other circumstances, if any, calculated to render the act tempt dangerous. As plaintiff was not in fault in starting to leave the train, the inquiry is, Did he exercise ordinary care in stepping from the car after he discovered it was in motion? Under the circumstances disclosed by the evidence, this inquiry was properly submitted to the jury."

If the train does not stop at all, nor make a halt, an attempt of a passenger to get off would, perhaps, constitute such negligence as would preclude a recovery. But if it stopped only for a moment, and was moving so slightly as to be almost imperceptible, then it would be for the jury to say whether it was such negligence as would preclude recovery: *Cloeworthy v. Hannibal etc. R. R. Co.*, 80 Mo. 220; *Straus v. Kansas City etc. R. R. Co.*, 75 Mo. 185; and whether the attempt of a passenger to step from the cars when the train is in motion is, under the circumstances of each particular case, such negligence as will relieve the railroad company from liability for injury occasioned thereby, is a question of fact for the jury: *Waller v. Hannibal etc. R. R. Co.*, 83 Mo. 608.

If a country boy eleven years of age is sent on a freight train to a city seven miles from home, by his mother, who previously warns him not to attempt to get off the train while it is moving, and, on his arrival at his station, fearing that the train will carry him off, and that he will not be able to get back, and upon being informed by an adult passenger that he guesses the train will not stop at the station, gets off, as such passenger has done, while the train is slowly moving past the station, and falls and is injured, the jury are justified in finding the conductor negligent in not telling the boy, when he collected his fare and asked his name and destination, that the train would first run past the station, and afterwards back down to the platform to allow passengers to alight, or in not being himself present, or having some one present, to prevent the boy from leaping from the moving train. In such case the child is not guilty of contributory negligence. *Hemmingway v. Chicago etc. Ry Co.*, 72 Wis. 42, 7 Am. St. Rep. 823, in which the court said: "A passenger may be exonerated from blame by being suddenly put in a condition of nervous excitement and alarm by the fault of the company, and who jumps from a moving train under a sudden impulse to save himself from serious inconvenience. Whether a justification exists may depend upon the speed of the train and other circumstances, or upon whether he did what careful and experienced persons generally would be likely to do under similar circumstances." To the same effect, *Shannon v. Boston etc. R. R. Co.*, 78 Ma. 52. In the prior case of *Jewell v. Chicago etc. Ry Co.*, 54 Wis. 610, 41 Am. Rep. 63, the rule is laid down that where a passenger has passed out of a railway car and got upon the platform thereof, and has attempted to step or jump from the car while it is in motion, he cannot recover for injuries sustained in consequence thereof, although he has reached his place of destina-

tion, and the train, which had previously stopped to permit passengers to alight, did not at this time stop a reasonable length of time; and the same ruling is adopted in *Reibel v. Cincinnati etc. R'y Co.*, 114 Ind. 476. This, however, as we have seen, is in direct conflict with the doctrine sustained by the great weight of authority,—namely, as is decided in *Nance v. Carolina etc. R. R. Co.*, 94 N. C. 619,—that it is not negligence *per se* for a passenger to alight from a train which has almost come to a full stop at a regular station, but that it is negligence in the railroad company to suddenly and violently start its train when passengers may be expected to be getting off, although the train has not come to a full stop, and is moving slowly. In such a case, where the passenger jumps from a railroad train while it is running at a speed of from two to four miles per hour, and this is the proximate cause of the injury complained of, and contributory negligence is alleged, the true criterion of care required of the passenger is that degree which may have been reasonably expected from a sensible and prudent person placed in the same situation: *Lambeth v. North Carolina R. R. Co.*, 66 N. C. 494; 8 Am. Rep. 508.

It seems to be the well-established rule that the act of the passenger in jumping from a moving train is *prima facie* negligence on his part, and in case of injury in so doing, the burden of proof is on him to show that he is not guilty of contributory negligence; in other words, to prove a good excuse for his act: *Shannon v. Boston etc. R. R. Co.*, 78 Me. 52; *New York etc. R. R. Co. v. Enches*, 127 Pa. St. 316; *Baben v. Central Iowa R. R. Co.*, 74 Iowa, 732.

A passenger is guilty of such contributory negligence as will bar his right to recover for an injury received in alighting from a moving train against the advice of the conductor or other employee of the company, or after he has been informed that the train would stop at his station: *Savannah etc. R'y Co. v. Watts*, 82 Ga. 229; *Vimont v. Chicago etc. R'y Co.*, 71 Iowa, 58. The rule is thus announced in *South and North etc. R. R. Co. v. Schaufser*, 75 Ala. 136. A passenger who steps from a train on a dark night, while it is moving at the rate of from six to eight miles an hour, before it has reached the platform of the regular station at which he is to get off, and with the locality of which he is acquainted, against the advice of the conductor, and without reason to believe that the train would not stop as usual, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in thus stepping from the train. And when the train is moving at so high a rate of speed, or where the place of the passenger's descent is so obviously dangerous that a person of ordinary prudence would not attempt to get off the train then and there, the act of the passenger in so doing is such contributory negligence as will bar his recovery, although invited to thus alight from the train by the conductor or other servant of the company: *Bardwell v. Mobile etc. R. R. Co.*, 63 Miss. 574; 56 Am. Rep. 842; *South and North etc. R. R. Co. v. Schaufser*, 75 Ala. 136; *Wabash etc. R. R. Co. v. Rector*, 104 Ill. 296; *East Tennessee etc. R. R. Co. v. Messingill*, 15 Lea, 328. Of course the railroad company is liable if its conductor or other servant gives the signal to start when the passenger is in the act of alighting from the train, and he therefrom suffers injury: *Chicago etc. R. R. Co. v. Mills*, 105 Ill. 63; *Strous v. Kansas City etc. R. R. Co.*, 86 Mo. 421; *Swigert v. Hannibal etc. R. R. Co.*, 75 Mo. 475.

PEYTON v. TEXAS AND PACIFIC RAILWAY Co.

[41 LOUISIANA ANNUAL, 381.]

RAILROADS—NEGLECT IN RUNNING TRAINS. — It is such negligence on the part of a railroad company to run accommodation trains through a city at a dangerous rate of speed to fair-grounds in the outskirts thereof while the fair is in progress, and to use for such purpose an inferior switch-engine, run by a fireman instead of by a competent engineer, as will entitle a person to recover for personal injuries received while prudently attempting to rescue another in danger of being run over.

CONTRIBUTORY NEGLIGENCE. — **WHEN ONE RISKS HIS LIFE,** or places himself in a position of danger, endeavoring to save the life of another, or to protect him from a sudden danger of great bodily harm or unexpected peril, such exposure and risk for such purpose is not negligence. The law will not impute negligence to an effort to preserve human life, unless under such circumstances as to constitute rashness in the minds of prudent persons.

EXCESSIVE DAMAGES FOR PERSONAL INJURIES THROUGH NEGLIGENCE. — A verdict for twenty-five thousand dollars for serious, though not permanent, personal injuries received through the negligence of a railroad company, is excessive.

MEASURE OF DAMAGES FOR PERSONAL INJURIES. — Substantial and compensatory damages should be awarded for serious, though not permanent, personal injuries received through the negligence of a railroad company, but speculative damages will not be allowed.

Wise and Herndon, for the appellant.

M. S. Jones, M. C. Elstner, and Bell and Randolph, for the appellee.

POCHE, J. Plaintiff claims damages in the sum of forty thousand dollars for personal injuries inflicted on him by one of the defendant's trains, through the alleged carelessness and fault of the railroad employees. The defense is a general denial, coupled with the plea of contributory negligence. Defendant appeals from a verdict and judgment in the sum of twenty-five thousand dollars. The evidence is conflicting on all the pertinent and material facts involved in the controversy.

After a thorough study of the record, we find, from the preponderance of the testimony, the following substantial facts as bearing on the issues of negligence on the part of the company, and of contributory negligence on the part of plaintiff:—

The accident occurred in November, 1888, at or near the fair-grounds situated on the outskirts of the city of Shreveport, while a fair was being held there. During the week of the fair, the company ran accommodation trains from its depot in the city, to the grounds and back, on a schedule of fifteen minutes each way.

While plaintiff and a large number of other visitors at the fair were standing on a temporary platform, erected near the grounds, awaiting an outgoing train on which they intended to return to the city, he noticed on the track, and in dangerous proximity to the approaching train, a person who was a friend of his, and who was in an inebriate condition, standing with his back to the train, and apparently unconscious of threatened peril. He at once resolved to save his friend, and, running to him, he succeeded in pushing him, off the track, but was himself struck by the pilot-beam of the locomotive to which the train was attached, and received injuries from which he suffered great pains, was disabled for several months, and from which he was not yet relieved at the time the case was tried below, at the end of the past month.

We are satisfied, from the preponderance of the testimony, which is very conflicting on this point, that in approaching that platform, full of people of all ages, which was the regular fair-grounds station for the defendant's accommodation trains, situated at the intersection of a public thoroughfare, the train was driven with unusual speed, and at a dangerous rate, without which the accident would not have occurred. It is also in proof that the locomotive used on the occasion was a switch-engine, not such as should be used to carry great numbers of passengers, and that it was in the charge of a fireman, not a regular or competent engineer, who was at that moment performing the functions of the regular engineer, the latter having absented himself in order to go to his evening meal.

All these circumstances combine together to make a clear case of negligence against the company.

The question of contributory negligence must now be met. The argument on that point is, that plaintiff brought on the accident himself by his reckless attempt to jump on a railroad track immediately in front of an approaching train, at a close and dangerous distance from it.

Plaintiff testifies, and he is corroborated by several unimpeached eye-witnesses, that without his or other prompt assistance the intoxicated man on the track would have been run over and probably killed.

Plaintiff, who was a strong and vigorous man of more than ordinary strength, states that from the appearance of things he believed that he could save the man and avoid injury himself

Similar positions and circumstances have several times been

presented to judicial investigation as involving the question of negligence, and have been variously construed. But the opinion which commends itself to our approbation as resting on sound principles of humanity is to the effect that they do not constitute contributory negligence on the part of the person who is injured in the attempt. Text-writers on railroad law and kindred subjects have formulated the rule thus: "When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."

The principle was culled from a well-considered opinion of the court of appeals of New York in the case of *Eckert v. Long Island R. R. Co.*, 43 N. Y. 503; 3 Am. Rep. 721; Beach on Contributory Negligence, 45; 2 Thompson on Negligence, 1174; Pierce on Railroads, 328; Rorer on Railroads, 1209.

The ruling has received subsequent judicial sanction; and appreciating it as rational, and as tending to foster a proper spirit of generous impulses towards persons who are in danger, we add our indorsement to that of other courts of last resort in other states of the American Union.

The evidence is satisfactory on the point that the attempt of plaintiff to save the life of a human being, or at least to rescue him from imminent peril, cannot be characterized as rash or reckless in the judgment of prudent men, and that his venture would have been successful and harmless if the train had not approached the station with reprehensible speed.

We now approach the question of the *quantum* of damages which plaintiff should recover in the case. In view of the finding of the jury, which met with the approval of the district judge in his refusal of a new trial, the solution of that question, to our satisfaction, under our desire and our duty to do even-handed justice to both litigants, has not been free of difficulty, and hence it has cost us much thought and study.

As we have had occasion to say in several cases, "While we not pretend to lay down any exact arithmetical rule of proportion in the estimate of damages, yet they must bear some kind of reasonable relation to each other in different cases, with the reserve, however, that damages should always

be substantial": *Towns v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 636; 55 Am. Rep. 508.

A review of our reports in similar cases points to only two occasions on which this court has allowed damages in excess of ten thousand dollars for personal injuries, and these were for very grievous and permanent results: *Barksdale's Case*, 23 La. Ann. 180; *Chapin's Case*, 17 La. Ann. 19.

Among other cases, we find an allowance of seven thousand dollars for an accident resulting in the death of the head of a large family, to whom he was the only support; another allowance, of five thousand dollars for the death of a man similarly situated; and in another case, a judgment of three thousand dollars for a like result: *Curley v. Illinois Cent. R. R. Co.*, 40 La. Ann. 810; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178.

And, in as far as our observation has gone, we find that the courts of other states of the Union have not reached as high figures as this court has allowed.

Substantial damages must be awarded in proper cases, but by all means speculative litigation must be discouraged, and possibly checked.

Now, in the present case, we have no hesitation in saying that the verdict is largely excessive, and beyond all measure and all precedents.

That the plaintiff was seriously injured, that he suffered great pain, was exposed to loss of time, loss of business, and to large expenses for medical assistance, cannot be denied, and evidence to that effect is uncontradicted; but it is equally true that he has rapidly improved under medical treatment; that for months he has been able to walk, go about, and attend to business, without the use of crutches, and without the need of assistance, and above all, that he is yet alive, fully able to earn his livelihood, and well disposed to enjoy life.

His most serious injury, and the most irritating cause of his sufferings is the inflammation in his hip-joint. But competent physicians, some of whom have rendered him professional services, and others who have critically examined him, all testify that with proper treatment, prudent care, and attention he can be radically cured.

Great reliance is placed by his counsel, as a fruitful source of damages, on the fact that he is now afflicted with hernia, characterized by symptoms of threatening strangulation, which

they confidently attribute to the railroad accident. Plaintiff himself testifies that it is a result of the blow which he then and there received. But of course his testimony is not that of an expert, and none of the physicians who were examined testify directly in the same sense. One of them says: "It [hernia] is frequently the result of direct violence, but I can't say as to this." True, plaintiff says that one of the physicians who attended to him at his home for several days saw his hernia and pronounced it very serious and perhaps dangerous. But this is merely hearsay, and a strange coincidence must be noted in this connection: the failure of plaintiff to take the testimony of that physician, and of another physician of his neighborhood, who rendered the first medical aid which he received after the accident.

Nothing in the nature of this case or in the surrounding circumstances can legally screen this party from the effect of the rule which jurisprudence applies to litigants who fail to produce important testimony easily within their reach, and presumably under their control: *Ketchum v. Texas etc. R. R. Co.*, 38 La. Ann. 779; *Day v. New Orleans Pac. R'y Co.*, 35 La. Ann. 694.

We are constrained to notice another circumstance which goes a great way to negative the assertion that hernia was one of the results of the accident. Nearly three weeks after he had been injured, plaintiff was placed, on the recommendation of his home physicians, under the treatment of Dr. M. M. Bannerman, of Grand Cane, Louisiana, as a surgeon of superior ability, who then took him and had him under his charge for more than a month, including three weeks during which he was under the doctor's own roof, receiving his daily and almost constant attentions of the most intimate character. And yet in his testimony Dr. Bannerman does not make a single reference to hernia in connection with his patient. Far from it, his testimony contains the following very significant statement: "Plaintiff, during my treatment, complained of no other injury resulting from the railroad accident, except that in his hip-joint."

It is in proof, and plaintiff himself testifies, that many years ago he was ruptured on the right side, and it is shown that he is now ruptured on both sides; but the evidence entirely fails to trace the second rupture to the railroad accident.

That element of damages must therefore be eliminated from the case. And we therefore conclude that an allowance

of five thousand dollars is amply sufficient to compensate plaintiff for all the pains that he has suffered, the loss of business and of time that he has incurred, to meet the expenses of past medical attendance, and to secure the future treatment and attention needed to fully restore him from the effects of the injuries which he received. To allow more would be enriching one litigant at the expense of the other.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount of damages to be recovered by plaintiff from twenty-five to five thousand dollars, and that, as thus amended, said judgment be affirmed, and that costs of appeal be taxed to plaintiff.

RAILROADS. — The general rule is, that negligence cannot be inferred from the rate of speed alone at which railway trains are run: *Dyson v. New York etc. R. R. Co.*, 57 Conn. 9; 14 Am. St. Rep. 82, and note. But a railway company is guilty of negligence *per se*, when it runs its train through a city at a rate of speed prohibited by ordinance: *Virginia Midland R'y Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 574; *Schlereth v. Missouri P. R'y Co.*, 96 Mo. 509; *Thompson v. New York etc. R. R. Co.*, 110 N. Y. 636. And the running of a train through a city at an undue rate of speed is always a circumstance tending to show negligence on the part of the company: *Union P. R'y Co. v. Rasmussen*, 25 Neb. 810; 13 Am. St. Rep. 527, and note; *Mcloy v. Chicago etc. R'y Co.*, 77 Iowa, 743; 14 Am. St. Rep. 325; *Savannah etc. R'y Co. v. Flannagan*, 82 Ga. 579; 14 Am. St. Rep. 183; *Chicago etc. R'y Co. v. Dunleavy*, 129 Ill. 132.

CONTRIBUTORY NEGLIGENCE. — It is not contributory negligence in one to imperil his life to save the life of another: *Donahoe v. Wabash etc. R'y Co.*, 83 Mo. 560; 53 Am. Rep. 594.

EXCESSIVE DAMAGES: See note to *Virginia Midland R'y Co. v. White*, 10 Am. St. Rep. 882. For a case where a verdict of twelve thousand dollars for actual damages for personal injuries was sustained: *Texas etc. R'y Co. v. Douglas*, 78 Tex. 326. And where a similar verdict of seven thousand five hundred dollars was decided to be not excessive: *Hallack v. Johnson*, 12 Col. 244.

MYHAN v. LOUISIANA ELECTRIC LIGHT AND POWER COMPANY.

[61 LOUISIANA ANNUAL, 964.]

MASTER AND SERVANT — MASTER'S PRESUMPTIVE KNOWLEDGE OF DANGEROUS MACHINERY. — An electric light company is presumed to know the dangerous character and condition of its wires, endangering the person and life of its employee in the discharge of his duty; and ignorance of the danger on the part of the company will not excuse it from liability to an employee who is injured without notice of the peril to which he is exposed.

MASTER AND SERVANT — DUTY TO WARN EMPLOYEE OF DANGEROUS MACHINERY. — An electric light company is bound specially to warn its employee of the nature of the danger arising from coming in contact with its exposed wires, and it will not be excused in case of injury, unless it proves that the employee well knew the danger, and, notwithstanding, exposed himself willingly and deliberately to it.

MASTER AND SERVANT — EMPLOYEE'S PRESUMPTIVE IGNORANCE OF DANGEROUS MACHINERY. — An employee of an electric light company is presumed to be ignorant of the danger arising from coming in contact with exposed wires, and in case of injury the burden of positive proof is on the company to show notice and knowledge of the danger on the part of the employee.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — DANGEROUS EMPLOYMENT. — It is not contributory negligence on the part of an employee to engage in a dangerous occupation. The risk assumed by the servant is the ordinary hazard incident to the employment, and unless the act causing the injury is necessarily and inevitably dangerous, no negligence can be imputed to him.

MASTER AND SERVANT. — EMPLOYEE MAY ACT UPON PRESUMPTION that the employer will not expose him to unnecessary risk, and has taken all necessary precautions, and may rely upon the care and trust to the superior knowledge, information, and judgment of the employer.

MASTER AND SERVANT. — EMPLOYEE IS NOT BOUND TO INQUIRE AS TO LATENT, but only patent, defects in machinery, and may presume that this inquiry has been made by the employer, upon whom the duty devolves; and although the servant may know of the defects, this will not defeat his claim for damages for injury, unless it is shown that he knew that the defects were dangerous.

MASTER AND SERVANT. — MASTER IS LIABLE FOR SUBJECTING HIS SERVANT THROUGH NEGLIGENCE to greater risks than those which fairly belong to the employment, and the servant need only raise a reasonable presumption of negligence on the part of the master in order to recover for an injury received.

George L. Bright, for the appellants.

Farrar, Jonas, and Kruttschnitt, for the appellee.

BERMUDEZ, C. J. This is an action in damages brought by a father and mother under the provisions of article 2315 (2294) of the Revised Civil Code as amended in 1884, page 94, No. 71.

They aver, substantially, that their minor son, Edward, aged about eighteen years, while in the employ of the defendant company, was, on the 8th of August, 1888, killed by the gross negligence and fault of the latter. The amount claimed is twenty-five thousand dollars.

The defense is a general denial, and contributory negligence. The case was tried by a jury, who rendered a verdict in favor of the defendant company. From the judgment thereon against them the plaintiffs appeal.

The charge made against the defendants is, that the accident occurred by their gross negligence and fault, which consisted in using wires which were not perfectly insulated, which formed a network on the floor, whereas they should have gone direct from the dynamo to the ceiling, and should have been placed beyond the reach of the employees.

In exoneration, the company charges, counter, that the young man, instead of approaching the dynamo (No. 35) in the reasonable and proper manner required by the circumstances, did so deliberately from the front, and deliberately straddled the two current-bearing wires leading from it, one to the ceiling, and one to dynamo 50, which was coupled with dynamos 35 and 36 into a series of three; that, by the movement thus occasioned, one of the wires touched the interior of the boy's thigh, and the other one the exterior of his buttock, thus making a circuit through his body, the shock of which threw him on the dynamo, and thence on the floor, where he lay upon these wires, breaking the circuit in his fall, and receiving the full force of it, which produced instant death.

The stubborn facts of the case are, that Edward Myhan, a young man of about eighteen years, was in the employ of the company on the 8th of August, 1888, as night-oiler, in the dynamo-room of their plant in this city; that, during the night of that day, while in the discharge of his duties as oiler, pressing tallow down in the box of a dynamo, he came in contact with one or more wires on or near the floor, and that he was instantly killed.

There were only two persons present when the accident occurred,—the electrician in charge of the dynamo-room, and a fellow dynamo-oiler.

The former (Crowley) says that from January, 1886, to August 14, 1888, he was employed by the defendant corporation as chief dynamo-man in their large plant in New

Orleans. There were about sixty dynamos in the establishment, arranged on the floor in series of three, each three connected to the plug-board.

He knew Edward Myhan, and had known him for nineteen months previous to his death, which occurred on August 8, 1888, at about eleven o'clock in the night, in the arc-light dynamo department of the defendant corporation. He was in the act of lubricating the dynamo-box with tallow. Owing to the arrangement of the wires on the floor, he had to stand astride the wires in order to get at the box. While in this position, one of his legs came in contact with a wire, and he received the full force of the electric current. At that time the witness was about twenty feet away. His attention was attracted by a dull thud and a flash. On turning around, he saw Myhan on the floor. He had broken the circuit in his fall. He (witness) pulled one of the wires from under his body, raised him in his arms, sent for the superintendent, who at once came down. Myhan gave one or two gasps thereafter, and then expired.

The witness further states: Edward Myhan was killed by the fault of the company defendant. The fault was in the arrangement of the dynamo wires. Part of the dynamos on the opposite side were properly arranged. Each dynamo was connected to the plug-board by two wires running from the dynamo to the ceiling, direct. On the other side, where Myhan was killed, three dynamos were connected to the plug-board by two wires, part of these wires running along the floor of the building, and part of them along the ceiling.

A proper arrangement would have been to connect each dynamo by two wires direct to the plug-board, and all the wires passing direct from the dynamos to and along the ceiling to the plug-board.

The arrangement of the wires on the floor was the cause of the death of Edward Myhan; for had they been connected from the dynamo to the ceiling, there would have been no danger in standing where Edward Myhan received the shock which caused his death.

The company, in the judgment of the witness, was negligent and careless in the arrangement of part of their wires on the floor.

He says that he frequently told the manager of the company, and also the superintendent, who were in charge of the plant, at different times during his services for the company,

that there was great danger in leaving the wires on the floor and unprotected.

No notice, says he, was ever taken of the warning, except they would remark they would attend to it by and by, or when they got a new superintendent, or offered some excuse of the kind, until the day after Edward Myhan was killed, when the superintendent and the general manager told him to get carpenters and have them nail poles on the dynamo frames, to attach the knobs, known as insulators, to the poles, and raise the wires from the floor and run them on the insulators, which he did.

Another witness (Sittig), a fellow-servant of Myhan, who was also present at the sad occurrence, was heard. He was in the employ of the company when he testified, and had been previously, and was in such employ when Myhan was killed.

Myhan walked to the machine, straddled the wire, and put his hand on the cup, and as he did so, one wire rested a little above his knee, on the left leg, and the other touched him on the right leg, on the inside, and he put both hands on the cup, and he fell with his back on the machine. Crowley ran him (witness) away, and told him he would get killed.

He was walking to Myhan when he was killed; saw him drop; he had his hand on the tallow-cup shoving down the tallow. He fell on the dynamo with his back. There were two wires attached to the dynamo, leading to another dynamo near the end. There were three dynamos connected by wires, two leading to each dynamo. The wires were on the floor. Nearly all the dynamos were in this way; three to the circuit. Wires were on the floor, where the men had to walk.

The morning after the killing, the witness went home, and when he returned in the afternoon, — six, P. M., — he found that some of the wires had been raised with poles overhead.

Two other witnesses (Burns and Bogel) testify in corroboration, except as to the circumstances of the accident. They establish the notices to the manager and superintendent, the dangerous character of the wires, the neglect, after notice, to remove them.

The change of the wires after the accident is shown by another witness, Wilson.

An electrician (Derbin), employed on defendants' plant across the river, says that the wires there are not laid on the floor, but run to the ceiling.

Another electrician (Krapp), of the Edison company, who had charge of the Edison station in the daytime as dynamo-man, says that he is an electrician; has been in the business some four or five years. He has visited the dynamo-room in question. Some wires were placed overhead, and others, coming down, connecting one machine, partly laid on the floor and partly brought up again and brought back. There is no doubt the safer way is to lay the wires from the ceiling, as is usual. He would not run them on the floor, but on the ceiling. It is practicable to insulate wires. By passing rubber tubes over them, contact with them will not create a current. Commercial insulated wire will not do. He would not straddle wires, not in that situation.

There is other testimony in the record to show the age, habits, qualities of Edward Myhan, his earnings, his devotion to his parents, their circumstances and need of his assistance, the condition of his body after the accident, and also testimony to show that the notices testified to were not given.

We have been at some pains to state the facts as sworn to by the witnesses, although this was not strictly necessary.

From the proof in the record, it most clearly appears that the young man was in the discharge of his functions as an employee of the company when he came in contact with a charged wire, in consequence of which he was instantly killed.

It is therefore undeniable that the wire or wires which he touched or which touched him were dangerous. Had they not been dangerous, they would not have killed him. He might have received a shock only, even becoming unconscious, but he would not have died from contact therewith.

The company's representatives had been warned several times of the dangerous character and condition of the wires on the floor; of the propriety, at least, if not the necessity, of running them up to the ceiling, but the warnings remained unheeded.

The representatives of the company, to whom it is said that the warnings were given, deny that they ever were; but this denial is of a weak character. The affirmative testimony, corroborated, as it is, outbalances the negative, and justifies the inference that the notices given were unheeded because they were forgotten.

At any rate, it was the duty of the defendant company to have known of the dangerous character and condition of the

wires. The knowledge which they ought to have had the law presumes, *juris et de jure*, they had. Even had the company's representatives sworn that they did not know of the same, such ignorance on their part would not have exculpated them. A superior is presumed to know, and in law knows, that which it is his duty to know, namely, whatever may endanger the person and life of his employee in the discharge of his duties.

In such cases, the superior is bound specially to warn the employee of the nature of the danger, and will not be excused in case of injury, unless he does prove that the employee well knew of the danger, and, notwithstanding, exposed himself willingly and deliberately to it.

In this case, there is no evidence showing that the company, or any of its officers, ever notified Myhan of the dangerous character of the wires in question, about which he had to move, or that he knew of the same. The burden of positive proof was on the defendant. The great presumption, not to say the certain proof, is, that he was totally unaware of the same; for it cannot for one instant be reasonably supposed that had he known that by coming in contact with the wires they would have stricken him down dead, he would have done so, thereby committing suicide.

It is manifest that, had the wires been laid as is usually done, or even been properly insulated, coming in contact with them would not have, as it did, produced death.

The testimony of the electrician in charge of the dynamo-room at the time the accident took place, and who was no longer in the employ of the company when he testified, is clear that Myhan had to stand astride the wires to get at the box; but this seems to be denied by the company, who say that Myhan could and ought to have gotten to them in another, which was the proper, way.

Their theory on the subject is purely hypothetical. It in no manner accords with the established facts and the great presumptions arising from them.

Even if it were otherwise, the most material, the staring, fact remains, that the wires were dangerous; that the company knew them to be such; that they did not specially warn Myhan, and did not show that he knew, that they were of that character.

The company admitted their perilous nature, not only by laying some in the very room, and in their plant across the river, in the manner in which they ought to have been placed,

but also by having the wires put in the proper condition, immediately after the accident.

Based on sound reason and sheer justice, the law, as expounded by jurisprudence, is clear, that it is not contributory negligence to engage in a dangerous occupation: Beach on Contributory Negligence, 370; Wood on Master and Servant, 763; that the risk assumed by the servant is the ordinary hazard incident to the employment, and this is synonymous with unavoidable accident: Wood on Master and Servant, 738; that unless the act is necessarily and inevitably dangerous, no negligence can be imputed: Beach on Contributory Negligence, 370; Wood on Master and Servant, 763; that the servant has a right to rely on the care, and trust the superior knowledge, information, and judgment of the employer, and to act upon the presumption that the latter would not expose him to unnecessary risk, and has taken all necessary precautions: Wood on Master and Servant, 681, 738, 739, 749, 751, 763; Thompson on Negligence, 975; that an employee is not bound to inquire as to latent, but only patent, defects; that he has the right to presume that this inquiry has been made by the employer, upon whom the duty devolves, and although the servant may know of the defects, this will not defeat his claim, unless it is shown that he knew that the defects are dangerous: Wharton on Negligence, sec. 215; Wood on Master and Servant, 186-189; that the master is liable for subjecting the servant, through negligence, to greater risks than those which fairly belong to the employment, and the servant need only, in order to recover, raise a reasonable presumption of negligence or fault on defendant's part: Wood on Master and Servant, 177; *Faren v. Sellers*, 39 La. Ann. 1020; 4 Am. St. Rep. 256.

Considering the facts and the law, we are driven to the conclusion that the company is responsible.

The other question to be considered is the *quantum* of damages to be allowed. This is not an easy task, in the absence of any rule or precedent by which to be governed.

The testimony shows that the plaintiffs were in the humble walks of life; that the husband is a policeman, on a salary of fifty dollars per month; that he has five children, and provides for three of them and for his wife; that Myhan was, at the time of his death, between eighteen and nineteen years of age, with a bright prospect of existence before him; that he was then earfing twenty-five dollars per month, which, as a dutiful son,

he employed to minister unto the wants of his father's family. Of his presence among them, and of that assistance, they are forever deprived.

The probability is, that, as he was a robust young man, attentive to his duties, and kind to his parents, he would have advanced in life, and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities.

It is for the deprivation of his presence and support that his father and mother are entitled, under the provisions of the law, to relief.

While we consider that the claim which they have set up for indemnity at twenty-five thousand dollars, is excessive and admit that it is almost impossible systematically to figure out by items what amount may prove to them an adequate relief, we think, under a somewhat instinctive appreciation, considering that as it is a probability that in the course of time the circumstances of Edward Myhan might have changed, had he lived, an allowance of two thousand dollars would not be unreasonable, and would relieve his parents awhile, to some extent, from the immediate consequences attending the severe injury inflicted on them.

It is therefore ordered and decreed that the verdict of the jury herein, and the judgment of the court thereon, be annulled and set aside, and it is now ordered and adjudged that the plaintiffs, William Myhan, and Catherine Crow, his wife, recover from the defendant, the Louisiana Electric Light and Power Company, the sum of two thousand dollars, with legal interest thereon, per annum, from the rendition of judgment till paid, and all costs of suit.

In the case of *Hauck v. Hernandez*, 41 La. Ann. 992, the action was brought to recover seven thousand dollars, the value of a saw-mill destroyed by a fire originating in porcelain-works of defendants, and communicated to the saw-mill adjoining. The plaintiff alleged negligence on the part of defendant in the construction of his kiln, and surrounding the same with wood-work, and that he was also negligent in not having the kiln and furnace sufficiently guarded by skilled watchmen. Plaintiff recovered a judgment for five thousand dollars, the amount of damage sustained by him, and from this judgment an appeal was taken. The saw-mill was destroyed by fire communicated to it from a fire originating in the defendant's porcelain-works, at five o'clock in the morning of November 25, 1886. The construction and operation of the porcelain factory had been authorized by the city council of New Orleans, and the framework thereof was about ten feet from the kiln.

The heat necessary to manufacture porcelain was about three thousand degrees Fahrenheit, and when this degree of heat was attained the fires were stopped. After the kiln had cooled, requiring from twelve to fifteen hours, the doors were taken down so as to remove the baked ware. A kiln of this kind requires constant attention until cooled, in order to prevent destruction to the kiln, and the communication of fire to the surrounding property by radiation. In the construction of their factory, the defendants did all that was necessary for the protection of their own or surrounding and adjoining property. Their kiln was constructed of the best materials, being laid inside with English fire-brick, and outside with the best of country brick, and surrounded at a distance of about ten feet with wood-work. They adopted and furnished all proper and improved methods to prevent and extinguish fires about the premises.

On November 24, 1886, the fires in the kiln were stopped at eleven o'clock. At three o'clock, A. M., of the morning of November 25, 1886, the doors were taken down, and some bricks placed on the outside to cool. At four o'clock of the same morning the watchman left the factory, and the foreman retired to his bed, where he remained until awakened by the firemen, who reached the scene of the fire while it was in progress, at about five o'clock. The watchman who left the factory was an inexperienced hand, and had never before been employed in attending a furnace. He was only temporarily employed, during the sickness of the regular fireman. In a short time after the employees had left the building, and the foreman had retired to his room, the building began to burn, and when he again reached the factory there was no watchman there. In deciding the case upon this state of facts, the court said: "A porcelain factory, or a furnace of any kind, is dangerous to adjoining properties, and a degree of care in its management is required in proportion to the danger it threatens." "Defendants were in the pursuit of a lawful occupation; and having adopted all proper and improved methods to prevent fire, and to extinguish the same, they could not be held liable without proof of negligence, or omission on their part to use the improved methods in their premises, or the negligence on the part of their servants intrusted with the care and the management of the same." "A mere statement of these facts shows great negligence on the part of defendants in failing to have the kiln and furnace watched and guarded by experienced employees from the time the firing ceased until it cooled, and in taking the doors of the kiln down at a time when there must have been great heat within it. At this critical time it was abandoned by defendants' employees. The defendants are responsible in damages for the injury sustained by plaintiff in the destruction of her saw-mill. The evidence supports the judgment appealed from. Judgment affirmed."

DUTY OF MASTER TO WARN SERVANT OF DANGERS.—A servant has the right to assume that machinery furnished him is safe, and adapted to the business in which he is employed; and it is the duty of the master to warn his servants of defects and dangers in machinery, etc.: *Galveston etc. R'y Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781, and notes.

MASTER IS ORDINARILY PRESUMED TO KNOW OF DEFECTS in machinery, and to be cognizant of exposure of his servants to extraordinary risks: *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 589.

SERVANT IS CHARGEABLE WITH KNOWLEDGE OF THOSE DEFECTS only that are open to his observation: *Missouri etc. R'y Co. v. Lehnberg*, 75 Tex. 62; *Denham v. Trinity County L. Co.*, 73 Tex. 78.

TEXAS AND PACIFIC RAILWAY COMPANY v. SOUTHERN PACIFIC RAILWAY COMPANY.

[41 LOUISIANA ANNUAL, 970.]

CONTRACTS TO STIFLE COMPETITION IN TRADE VOID AS AGAINST PUBLIC POLICY. — All contracts which have a palpable tendency to stifle competition and create monopolies, either in the market value of commodities, or in the carriage or transportation thereof, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which courts can recognize or enforce.

CONTRACTS — RAILROAD POOL TENDING TO STIFLE COMPETITION ILLEGAL. — A railroad pool, or agreement and arrangement between two competing railroads between given points to divide equally between them their earnings from competitive tariff between such points, is illegal as against public policy, and does not therefore confer upon the parties to it any rights which courts can recognize or enforce.

CONTRACTS TO STIFLE COMPETITION. — In refusing to enforce contracts which have a palpable tendency to stifle competition, or to create or foster a monopoly, courts will not decree the nullity of the contract sued on, but simply abstain from dealing with it, or from discussing any of its effects as between the parties; hence aid will not be given to secure an otherwise fair division of the results of the illegal contract between the parties.

Howe and Prentiss, and Thomas J. Semmes, for the appellants.

Leovy and Blair, for the appellees.

POCHE, J. Plaintiff's object is to enforce specific performance of one of the stipulations contained in a contract or agreement executed by the two corporations on the 26th of November, 1881, and modified or amended on the 18th of February, 1885. The agreement was entered into, on the one part, by several railroad companies operating in the states of Texas and Louisiana, then controlled and therein represented by Collis P. Huntington, of the city of New York; and on the other part, by several similar corporations, also operating in Texas and in Louisiana, then under the control of Jay Gould, of the city of New York, and who therein acted in behalf of said companies.

The expressed object of the contract was to adjust certain differences existing between the companies represented by Huntington and those represented by Gould, and to put an end to existing litigation growing out of such differences and difficulties.

Hence the instrument signed by the parties, and the amendment thereto subsequently made, contained numerous stipula-

tions intended to carry out the object proposed; and all have apparently been executed, save one, which is the subject-matter of this controversy. That feature of the contract is in the following words:—

VI.

"MUTUAL AGREEMENT TO POOL NEW ORLEANS AND GALVESTON TRAFFIC, AND NOT TO DISCRIMINATE AGAINST MISSISSIPPI TERMINI.

"It is further mutually agreed, that all unconsigned business, meaning all business whereof the route has not been designated in advance, destined for points west of El Paso, received by the said Texas and Pacific Railway Company, shall be turned over to the Galveston, Harrisburg, and San Antonio Railway Company at the junction, or to the Southern Pacific Railroad Company at El Paso, as the case may be; and all such unconsigned business received by the Southern Pacific companies and destined to places east of the junction reached by the Texas and Pacific railway and its connections north of Shreveport, Louisiana, and west of the Mississippi River, shall be delivered to the Texas and Pacific Railway Company at the junction, or at El Paso, as the case may be. The gross earnings on all business passing over either of these roads between El Paso or the junction and New Orleans shall be divided equally; and the gross earnings on all business passing over either of these roads between El Paso or the junction and Galveston shall be divided on the basis of two thirds thereof to the Galveston, Harrisburg, and San Antonio Railway Company and its connections, and one third thereof to the Texas and Pacific Railway Company and its connections; and the agents are to divide, as nearly as possible, such business between the two through lines, so that each shall do the proportion of business above allotted.

"In the event that either of the said companies of the one party, at either of the termini herein mentioned, shall be unable, or shall neglect or refuse, for any cause, to take the business and to perform the said service in the proportions above named, the company or companies of the other party shall be at liberty, so long as such disability continues, to take such business and perform said service, and shall be entitled to receive the compensation therefor.

"The Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Missouri, Kansas, and Texas

Railway Company, the St. Louis, Iron Mountain, and Southern Railway Company, the International and Great Northern Railroad Company, and the Galveston, Houston, and Henderson Railroad Company, shall severally take the through business any of them may have to do under this agreement, between El Paso and any point on the Mississippi River, without any discrimination as to rate, or otherwise, in favor of any line, road, or transportation company, and with equal dispatch; and this provision applies to business destined to or coming from any railroad east of the Mississippi River.

"There shall be no discrimination as to local business by any of the roads of either of the parties as against those of the other party; it being understood that the term 'through business,' as used in this agreement, applies to traffic carried to and from terminal, common, or competitive points, and any point upon the lines of the railways of the parties hereto that may be reached directly or indirectly by any railroad competitive to either of said roads is understood to be a competitive point."

The amendment of February, 1885, in so far as this section of the contract is affected, provides a different mode of dividing the earnings; it also extends the traffic covered by the agreement to all the business between New Orleans and El Paso on the one hand, and Galveston and El Paso on the other, whether the traffic originated at these points or not.

Among other stipulations which have no bearing on the issues herein involved, the amendment contained the following modification: "It is a part of the agreement of the parties hereto, that, in consideration of the premises, the said party of the second part and his associates, and the companies on whose behalf he executed the said agreement of November 26, 1881, release the said party of the first part and his associates, and the companies on whose behalf he executed such agreement, from all claims down to November 1, 1884, arising under article 6 of said agreement."

Plaintiff's demand is based exclusively on the section hereinabove transcribed, and embraces three separate claims growing therefrom. Its object is to recover the excess of earnings realized by the defendant company from the 1st of November, 1884, to March 31, 1887, alleged to amount, as shown by defendant's reports, made from month to month during that space of time, to the sum of \$350,717.78; a similar excess, alleged to amount to \$200,000, from March 31, 1887, to January,

1888; during which time the defendant made no report, the defendant having ceased and refused to further report or account after March, 1887; and it urges an additional claim of \$5,859.49 for an excess of earnings in its favor in the operation of certain lines of railroads in New Mexico and Arizona, thus footing up the claims at the aggregate sum of \$556,577.27. And plaintiff's demand finally covers such additional claims growing out of the contract in suit as may be discovered and ascertained on trial.

For defense, the following exceptions were pleaded: 1. That the contract sued upon, being a railway pool between competing railroad companies to divide between them their earnings from competition traffic, is illegal, for the reason that it is injurious to public interests and contrary to public policy; and hence it cannot be enforced by a court of justice; 2. That the contract was forbidden by the provisions of the constitution of the state of Texas, in force at the time that it was entered into; 3. That, if ever valid, the contract was terminated by the provisions of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," which went into effect on the 3d of April, 1887, and is generally known as the Interstate Commerce Act.

The judgment below was in favor of defendant, and plaintiff appeals.

A point, which overshadows the discussion of all three of the exceptions, is made by plaintiff's counsel, who contend that the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally.

As a general proposition of law, the contention is unquestionably correct: Civ. Code, art. 3078; *Adle v. Prudhomme*, 16 La. Ann. 343; *Raburn v. Pierson*, 23 La. Ann. 696; *Oglesby v. Attrill*, 105 U. S. 605. But from the very nature of the principle, as shown by the authorities cited, it appears clearly that those matters only which were covered by and included in the compromise or agreement are affected as things adjudged, as a result of the adjustment, even when the same is subsequently sanctioned or confirmed by the judgment of a competent court.

The rule invoked applies to matters of pre-existing differences which are settled and compromised, and not to agreements or covenants for future action and execution.

Undoubtedly the attempt of either party to the Gould-Huntington agreement to avoid collaterally the effect of the adjustment of any contentious matter, or of any litigious rights involved in litigation hitherto pending, and which had been in terms settled by the compromise, would have been defeated by the simple application of the principle now under consideration. But the subject-matter of article 6 of the agreement which is now in suit was not a subject of contention between the parties, either as a difference, or in the shape of any pending litigation, at the time that the agreement was entered into. In fact, it had no existence before, and was only brought into being or life by, the contract of November 26, 1881, and it had no reference to the past, but its whole operation or effect was intended exclusively for the future.

This was manifestly the understanding of all the parties at the time; it shaped the action of their counsel, who thereafter invoked judicial confirmation of the adjustment, and it was the sole guide of the court when it rendered the decree now set up as *res adjudicata*, touching all matters and stipulations contained in the Gould-Huntington agreement.

In formulating its decree, the court was careful to enumerate in detail all the litigious matters which were in suit between the several railroad companies which had participated in the adjustment, and which were parties to litigation then pending before the court; and it requires no argument to show that no other matters or stipulations in the agreement were in any way or degree affected by the judgment then rendered.

To clear away any doubt which might thereafter exist or be suggested as to the precise meaning, bearing, intent, and effect of the judgment rendered, the court made the following explanation of its own decree as part of said decree: "The aforesaid decree is made to carry out the provisions *in this behalf* of said agreement, dated November 26, 1881, which is hereby made a part of this decree, and by consent of the parties, and upon consideration by the court, is hereby ordered and decreed to be binding upon each and all of the parties hereto in all its stipulations and agreements, as *therein shown*, and said decree does not *otherwise affect or interfere with the provisions of said agreement.*" (Italics are ours.)

Hence we conclude and we hold that the stipulations of article 6 of the Gould-Huntington agreement have not the force and effect of the thing adjudged, and that they are lawfully liable to attack in the mode and manner herein adopted

by the defendant corporation. This conclusion is, of course, mainly predicated on the theory, fairly deducible from the record itself, that the agreement in its entirety does not evidence a single and connected contract depending on all its parts and stipulations for a proper execution as an effect flowing from the unity of the contract; but that the instrument in its shape was used as a means to facilitate the execution by two representatives of numerous obligors and distinct obligees of a series of varied and distinct contracts. As controlling and representing the varied interests of a cluster of railroad companies, Huntington acted in behalf of the following corporations: The Southern Pacific Railroad Company of California, the Southern Pacific Railroad Company of New Mexico, and the Southern Pacific Railroad Company of Arizona, the Galveston, Harrisburg, and San Antonio Railway Company, the Texas and New Orleans Railroad Company, and the Louisiana Western Railroad Company. And Gould, clothed with corresponding authority from his system of roads, stipulated in behalf and in the name of the following companies: The Texas and Pacific Railway Company, the International and Great Northern Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas, and Texas Railway Company, and the St. Louis, Iron Mountain, and Southern Railroad Company.

In this connection, the record shows to our entire satisfaction that the parties themselves did not understand that the instrument was intended to evidence a single connected contract, as appears from the following stipulation: "The foregoing agreement shall be submitted by the respective parties thereto to the several boards of directors which they respectively represent, and the same shall be accepted, adopted, ratified, confirmed, made, and declared by said several boards of directors to be the act and contract of their respective corporations, so far as the same affects them respectively."

And the same understanding appears in yet bolder relief from the language used in the following clause: "It is understood that either or any of the said several railroad companies, parties to this agreement, may maintain any action, either at law or in equity, against either, any, or all of the other companies, parties to this agreement, to protect any right secured by this agreement, to specifically enforce the same, or to recover damages for the breach of any stipulation in this agreement affecting its interests, and that no objection shall be had or

taken to any such action by reason of the non-joinder of parties as plaintiffs; and all clauses in this agreement contained are to be so construed as to secure this right." The parties have thus construed their own contract, and have themselves qualified their agreement in a manner which completely refutes the argument of plaintiff's counsel in the present case.

It is true that, by the act of incorporation, in 1884, which created the defendant company in its present autonomy, all the corporations which were then represented by Huntington, with the exception of the Southern Pacific railroad companies of California, of Arizona, and of New Mexico, have all been fused into and were made parts of the same system known as the Southern Pacific Company. But this does not alter the nature and legal effect of the original contract as executed and understood by the original parties to the agreement.

That it was so understood is made manifest by a clause inserted in the amendment of the agreement under date of February 18, 1885, which stipulates, as was done in the original contract, that the modifications then made were to be submitted, for adoption and ratification, to the respective boards of directors of the companies represented respectively by Huntington and by Gould.

We feel, therefore, fully warranted to treat and discuss article 6, now in suit, as a complete and independent contract with a sole consideration, which was the mutual advantage to be derived therefrom by the companies to be affected thereby. The clause or contract as shaped has reference to no other portion of the agreement, which is complete for the purposes originally contemplated without the contract contained in that clause,—as complete as the contract formulated in the section stands without any reference to any or all of the other portions of the agreement. In discussing that article, we have therefore no concern with any of the concessions made mutually by the parties to the agreement as considerations for other matters specified, or other advantages yielded or obtained, by the parties respectively in other portions of the agreement.

We shall now discuss the real nature and the legal effect of the contract evidenced by article 6 of the Gould-Huntington agreement.

It appears, from the record, including evidence taken on the trial of the exceptions, that the systems of railroad companies made parties respectively to the proposed arrange-

ment had each a through and complete line of communication absolutely independent of each other, except as hereafter stated, from El Paso to Galveston, and from El Paso to New Orleans, the points of traffic for which the earnings of the contracting parties were to be divided. From El Paso to New Orleans the Texas and Pacific, plaintiff herein, had a continuous line of communication of itself, and from El Paso to Galveston its means of communication were by its own line from El Paso to Minola, and thence by the International and Great Northern Railroad Company, connecting with the Galveston, Houston, and Henderson Railway Company, two of the companies controlled and represented by Jay Gould.

The communication of the Southern Pacific, defendant herein, between El Paso and Galveston was by means of the Galveston, Harrisburg and San Antonio Railway Company and the Galveston, Houston and Henderson Railway Company, and its means of communication between El Paso and New Orleans were through the lines of the Galveston, Harrisburg, and San Antonio, the Texas and New Orleans, the Louisiana Western, and the Morgan's Louisiana and Texas railway companies, all then controlled by Huntington, and now parts of the Southern Pacific system. The only parcels or portions of the through lines between either of the three points of traffic used in common by the two systems are a line of ninety miles east of El Paso and a short line between Galveston and Houston, and the rights of the parties to the use of these two lines were secured in the agreement of November, 1881, in two separate and distinct stipulations outside and entirely and safely independent of article 6, now under discussion. There is no contention here as to the free exercise of that right.

Now, as at certain points, both in Texas and Louisiana, it appears that the respective lines of the plaintiff's and of the defendant's systems of roads are very far apart, there is no pretention that they are parallel roads, but, from the record, as shown by the foregoing statement, it appears very clearly that for the traffic between El Paso and New Orleans, and between El Paso and Galveston, they were unquestionably competing lines.

It cannot be doubted that shippers who desired, without the existence of the agreement contained in article 6, to consign goods either from El Paso to New Orleans or the reverse, or from Galveston to El Paso or the reverse, had

the option to select either of the two lines in accordance with the most favorable terms which he could obtain from either. He would then have had the advantage of the natural competition existing between the two rival systems. But under the effect of the arrangement now under discussion, the shipper could desire no advantage as a result of his choice between the two, as the terms would be the same with either or both.

It is therefore too clear for further argument or illustration that the first, the lasting, and the inevitable result of the agreement to the public was to stifle competition, and as competition is the life of trade, the effect of the contract must necessarily and inevitably have been injurious to public interests, and hence it was contrary to public policy.

We have been at great pains and have devoted long and tedious labor to examine all the authorities, consisting mainly of opinions rendered on this point by courts of last resort in this country, which were submitted to us by counsel in this case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities, or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce. A reference to some of the leading and most pointed authorities on the subject may not be out of place in this opinion, notwithstanding its already formidable length.

In the case of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, the court had to consider a contract between the proprietors of several lines of canal-boats, who had agreed to establish fixed rates of freight and passage for a certain season and to divide the net earnings among themselves according to fixed rules. The attempt of one of the contracting parties to enforce the agreement against a recalcitrant member of the combination was discountenanced. True, the contract fell under the ban of a special statute of the state; but the court, nevertheless, took occasion to sanction the general principle which underlies our conclusions in this case. The court said: "It is a general proposition that an agreement to do an unlawful act cannot be supported at law; that no right of action can spring out of an illegal contract; and this rule applies not only when the contract is expressly illegal,

but whenever it is opposed to public policy, or founded on an immoral consideration, he maxim being, *Ex turpi causa non oritur actio.*"

In the case of *Stanton v. Allen*, 5 Denio, 484, 49 Am. Dec. 282, the court refused its aid to enforce the payment of a promissory note growing out of transactions predicated on a similar contract, on the ground that such a contract cannot receive judicial sanction. We cull the following language from that opinion: "Though the branch of the law relating to public policy is liable to be misunderstood and extended beyond its proper dimensions, still it must not, on that account, be neglected or disparaged. The rule that contracts and agreements are void when contrary to public policy, when properly understood and applied, is one of the great preservative principles of a state."

And referring to the case herein previously quoted, the court said: "That decision being conclusive on the main point in the present case, I might have rested upon that authority alone, if I had not supposed that the occasion called for an opinion as to the legality of such an association upon the principles of the common law."

In Ohio, an association of salt manufacturers entered into a combination for the purpose of selling and transporting that commodity. The court refused its aid to enforce its conditions, saying, among other things: "The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public": *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

The doctrine finds additional support and sanction from the following authorities: *Gibbs v. Consolidated Gas Co.*, 180 U. S. 408, in which the court took occasion to set down a rule peculiarly applicable to pooling arrangements between competing railroad companies, which are universally recognized and treated in jurisprudence as *quasi* public corporations. The learned chief justice, as the organ of the court, said with great clearness and terseness: "Hence, while it is justly urged that

those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, . . . yet in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy." See also *Woodstock I. Co. v. Richmond etc. Extension Co.*, 129 U. S. 644; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Arnott v. Pittston etc. C. Co.*, 68 N. Y. 553; 28 Am. Rep. 190; *Craft v. McConoughty*, 79 Ill. 346; 22 Am. Rep. 171; *Morrill v. Boston etc. R. R. Co.*, 55 N. H. 537; *Jackson v. McLean*, 36 Fed. Rep. 218; *Santa Clara v. Hayes*, 76 Cal. 387; 9 Am. St. Rep. 211; Hamilton's note, 15 Fed. Rep. 667.

We are referred by plaintiff's counsel to several authorities which are quoted as antagonizing the views which we have adopted in this opinion. But we have not found any decisions emanating from American courts of last resort which have enforced or recognized any rights flowing from a contract which had a tendency to stifle competition in trade, or in the business of common carriers, or which were for other or similar reasons contrary to public policy. The adjudications which have sustained contracts assailed on similar grounds are predicated on facts which removed each particular case from the operation of the rule, for the simple reason that "cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered": *Oregon S. Nav. Co. v. Winsor*, 20 Wall. 64, 68.

Under our own system, the doctrine is not only sanctioned by judicial authority, but it has been specially incorporated in our code, in its wide range of remedies for wrongs and enforcement of rights.

Article 1893 reads: "An obligation without a cause, or with a false or unlawful cause, can have no effect."

Article 1895 provides: "The cause is unlawful when it is forbidden by law, when it is *contra bonos mores* [contrary to moral conduct] or to public order."

In the case of *Firemen's Association v. Berghans*, 13 La. Ann. 209, the principle was formulated thus: "When a contract belongs to a class which is reprobated by public policy, it will

him. And if they had, by any such means, got possession of the land-warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land-warrant or scrip to the soldier. Or if Brooks, after signing these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such refusal."

This is precisely the legal attitude occupied by the parties in this controversy.

In an illegal contract, the defendant herein had agreed and covenanted to pay over to plaintiff any pool balance to which the latter was entitled under the arrangement to divide their joint earnings in the traffic between El Paso and Galveston, and that between New Orleans and El Paso. It has acknowledged the existence of such a balance, but when called on to deliver the same, it refuses, and sets up the illegality of the contract under which it was obtained. The answer of the court must be that plaintiff, urging a claim based exclusively on an illegal contract, is without remedy.

Having concluded that the contract sued on was illegal as contrary to public policy, we see no necessity to discuss the two other grounds of exception set up by the defendant.

Judgment affirmed.

CONTRACTS ARE VOID AS AGAINST PUBLIC POLICY which tend to suppress competition: *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258; *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; or to build up monopolies: *Crawford v. Wick*, 18 Ohio St. 190; 98 Am. Dec. 103.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

**BROOKS v. CEDAR BROOK AND SWIFT CAMBRIDGE
RIVER IMPROVEMENT COMPANY.**

[32 MAINE, 17.]

A RIVER, THOUGH A NON-NAVIGABLE STREAM, IS A HIGHWAY for all the people of the state, if in its natural state it is capable of floating to market logs and other products of the forest.

RIPIARIAN OWNERS HOLD THEIR LAND SUBJECT TO THE RIGHT OF THE PUBLIC TO USE THE NAVIGABLE RIVERS flowing through them as public highways, and to improve such rivers as public highways by any appropriate means, whenever this can be done without taking private property.

TAKING PRIVATE PROPERTY FOR PUBLIC USE, WHAT IS NOT. — An improvement in a river, consisting of a dam erected by legislative authority, which causes an increased flow at times, whereby the channel is deepened and widened, and the soil somewhat worn away, is not a taking of the lands of a riparian proprietor through which the river flows, and whose soil is thus carried away. The injuries suffered by him are consequential, and he is not entitled to any redress.

DAMAGES — CONSTRUCTION OF CHARTER. — A charter authorizing a company to build a dam, and to take certain materials therefor, "being accountable to the owners thereof for all damages, if any, to be ascertained by reference or by action on the case," does not entitle a land-owner to recover for consequential injuries resulting from the deepening and widening of the channel of the stream by the increased flow of water, and the carrying away of an increased portion of his soil.

D. Hammons, for the plaintiff.

A. E. Herrick, for the defendant.

EMERY, J. Facts agreed. Swift Cambridge River, in Maine, is a non-tidal stream, but is capable, in its natural state, of floating to market logs and other products of the forest, and hence is a public highway for all the people of the state:

Brown v. Chadbourne, 31 Me. 9; 50 Am. Dec. 641. The legislature authorized the defendant company, among other things, to build dams across this river for the purpose of facilitating the driving of logs and improving the navigation: Special Laws 1877, c. 106. The defendant company, in pursuance of its charter, and for the purposes named, built a dam across the river, about four miles above the plaintiff's land. There is no suggestion in the statement of facts that the dam is not properly constructed, and not wholly within the terms of the defendant's charter.

The head of water accumulated by this dam increases the flow below the dam when the gates are opened for the passage of logs. This increased flow facilitates the driving of the logs, which is the object of the company's charter and works. The greatest increase in the height of the river, where it passes through the plaintiff's land, caused by this increased flow, is one foot. The action of this increased flow of water, and of the logs borne along upon it, "has tended to widen and deepen the stream by gradually wearing away the soil of the banks and bottom across the plaintiff's land."

The plaintiff brings this common-law action to recover damages for that injury to his land. He makes no other complaint. None of his land has been appropriated by the defendants. They have not flowed nor occupied his land. They have not diverted any water from or upon it. So far as appears, they have, by their erections, detained the water a reasonable time, and let it down in reasonable quantities, at proper seasons. This is just what is being continually done on nearly every stream in the state, and what every riparian owner submits to with little thought of claiming damages.

The plaintiff's injury, if any, does not flow from the wrongful act of any one, and hence is *damnum absque injuria*. To hold otherwise,—to hold that the mere tendency of an increased flow of water, at times, in its natural channel, to wear away soil, is in itself a cause of action against the owners of mills and dams, would prevent all improvement of inland navigation, and would paralyze all industries dependent on water-power. A law requiring such a judgment can never have been established by the people.

The plaintiff urges, however, that the legislature cannot authorize the improvement of the navigation of the public streams of the state without providing compensation to riparian owners for such injuries as his. It may be at once con-

ceeded fully that the legislature cannot authorize the taking any property of a riparian owner, for use in improving the navigation, without providing compensation. If riparian land is taken for storage of water, or for a receptacle for discharged waters, or for dams, locks, etc., the owner is entitled to compensation for the injury caused by such taking. This concession, however, does not include incidental injuries, where no land is appropriated, and no water is diverted.

The riparian owners on all public streams in this state hold their riparian lands subject to the paramount right of navigation of such streams by the public. The public right of navigation existed before the private ownership of the land under or adjoining the public streams. The title to the whole lands and rivers, was first in the sovereign, whether king, province, or state. In all the grants of lands from the sovereign there is always, at least unless otherwise expressly stipulated, a reservation of the public right to use all navigable rivers as public highways. Such a reservation naturally and properly retains with it the right for the sovereign to make and authorize all reasonable improvements, from time to time, to facilitate the use of the river by the public, even though the land-owner thereby suffers inconvenience or loss, so long as none of his property is actually appropriated by the sovereign. This sovereign right has been continuously exercised in this state since its first settlement, and by the general if not universal consent of all its citizens. The statutes of nearly every legislative session contain acts authorizing the improvement of rivers as public highways, by the erection of dams, and applying to nearly all the public rivers of the state. All these acts assume the right of the state to make such improvements, without making compensation, except where private property is actually appropriated. The general statute authorizing the erection of dams for creating water-power contains no provision for compensation to riparian owners, when the stream is not diverted nor the land overflowed. The early, long-continued, and universal acquiescence in the exercise of such a right is the strongest evidence of its existence. A judicial decision can hardly be necessary to establish it.

The courts, however, have recognized this right of the state, In *Moor v. Veazie*, 32 Me. 343, 357, 52 Am. Dec. 655, the court, through Chief Justice Shepley, declared (quoting from Hale's *De Jure Maris*, c. 4, prop. 3) that "the common law accorded to the sovereign power the 'care, supervision, and protection'

of the common right of navigation in navigable rivers," and the court further used the following language: "The power which has the 'care, supervision, and protection' of a common right is bound to regulate its use in such manner that it may be safe and convenient. The duty to make the use safe and convenient involves the right to remove obstructions, to improve or to render more safe and convenient the waters for the purposes of navigation." In *Sumner v. Richardson Lake Dam Co.*, 71 Me. 106, it did not appear that the defendants' dam in any way caused the injury complained of, and hence the case is not directly in point. Still, the defendant company was chartered to build dams to improve the navigation of a public stream, and the court plainly intimated that the charter was lawful, though it did not provide compensation for consequential injuries, — such injuries as are complained of here.

In other states, this question between the state and the riparian owners has been directly presented and adjudicated. In *Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36, the defendant company was authorized by the legislature to build piers, wharves, bridges, etc., in the Connecticut River, to improve its navigation. The company's works, built under its charter, deflected the current of the river against the plaintiff's land, washing it gradually away. It was held that the plaintiff had no cause of action. The decision was put on the ground that the state had the control of the river, and the right to improve its navigation, by any appropriate means, and that every grantee of land on the river took subject to that right. In *Holyoke Water Power Co. v. Connecticut River Co.*, 20 Fed. Rep. 71, the same doctrine was upheld by the federal court in the Connecticut district. In *Henry v. Vermont Cent. R. R. Co.*, 30 Vt. 638, 73 Am. Dec. 329, the defendant company, in pursuance of legislative authority, constructed works that turned the current of a stream, so that it washed away the plaintiff's land. It was held that the injury was consequential only, and that the plaintiff could not recover. In *Alexander v. Milwaukee*, 16 Wis. 247, the city, under legislative authority, made a "straight cut" across a point of land to improve the harbor. The current flowing through this straight cut came against and wore away the plaintiff's land. Held, that the plaintiff had no cause of action. In *Green v. Swift*, 47 Cal. 536, the defendants, by legislative authority, changed the current of American River so as to make the floods less dangerous at Sacramento. This change caused the current to wash the lands of the plain-

tiff. Held, that the defendant was protected by the legislative authority. In *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 383, 47 Am. Dec. 474, the company, under its charter, built dams and locks in the Monongahela River, to improve its navigation. These works so held back the water as to retard the current in the Youghiogheny River above, to the injury of the plaintiff. Held, that the state had the right to improve the navigation of its rivers, and that the plaintiff had no cause of action. The same doctrine is well expressed in a later Pennsylvania case, *McKeen v. Del. Canal Co.*, 49 Pa. St. 439, by Agnew, J., as follows: "The injury which followed the raising of the water in the stream, to improve the navigation, was not a taking of property, but one merely consequential, which he must suffer without compensation. Every one who buys land upon a navigable stream purchases subject to the superior right of the state to regulate and improve the stream for the benefit of all her citizens."

It is urged, however, that the defendant's charter makes them responsible in this action for the plaintiff's injury. By the second section of the charter, the company is authorized to take land and materials, "being accountable to the owners thereof for all damages, if any, to be ascertained by reference, or by actions on the case." This does not include consequential injuries. The right of action here specified is clearly confined to land and materials taken by the company. No land nor materials have been taken in this case: *Hollister v. Union Co.*, 9 Conn. 436; 25 Am. Dec. 36.

Judgment for the defendant.

WATERCOURSES. — While the public right of floatage exists in streams capable of floating logs cut in the vicinity, still the public have no other rights than those furnished by the natural water-way. The riparian owners have a right to the enjoyment of the natural flow of the stream, with no burden or hindrance imposed by artificial means: *Koopman v. Blodgett*, 70 Mich. 610; 14 Am. St. Rep. 527; *Witheral v. Muskegon B. Co.*, 68 Mich. 48; 13 Am. St. Rep. 325, and note.

SMITH v. BIBBER.

[32 MAINE, 34.]

NEGOTIABLE INSTRUMENT — CONSIDERATION FOR INDORSEMENT. — Negotiable instrument transferred before due, as collateral security for a pre-existing debt, with no new consideration between the parties to such transfer, is subject to any defense that might have been made as between the original parties.

FORBEARANCE TO SUE, WHEN A SUFFICIENT CONSIDERATION. — Actual forbearance to sue for the collection of an existing debt is not a sufficient consideration to support a transfer of a negotiable instrument to secure the original debt, so as to cut out a defense existing against such paper as between the original parties thereto, unless there was a valid promise to forbear for some specific time, so that for such time the right of action was suspended.

ASSUMPSIT to recover moneys due on a note dated October 1, 1882, made by defendant in favor of Phinney and Jackson, and by them delivered to plaintiff as collateral security for a pre-existing debt. The defendant claimed that he had paid the note sued upon before it had been delivered to plaintiff, and that plaintiff took it to secure a pre-existing debt, and without advancing any new consideration. Verdict for plaintiff.

Symonds and Libby, for the plaintiff.

S. C. Strout, H. W. Gage, and F. S. Strout, for the defendant.

LIBBY, J. At the time the note sued on was made, it was the settled law of this state, as decided by this court, that a promissory note indorsed and transferred by the payee, before due, as collateral security for a pre-existing debt, with no new consideration between the parties therefor, was subject to any defense that might be made as between the original parties: *Bramhall v. Beckett*, 31 Me. 205; *Nutter v. Stover*, 48 Me. 169.

The defendant set up in defense payment of the note to the payee before it was indorsed to the plaintiff. As between the payor and payee this is a good defense. The contention between the parties at the trial was, whether this defense could be set up against the plaintiff, to whom the note was indorsed before due, as collateral security for a pre-existing debt, as the defendant claimed, without any new consideration.

On this point the court below instructed the jury as follows: —

“Now, in order for the plaintiff to recover, he must satisfy you, in the first place, that the note in suit was placed with

the plaintiff to secure the whole indebtedness. Second, either that there was a valid consideration for the note, and that it was still unpaid at the time the plaintiff received the note, or that the plaintiff, when he received the note from Phinney and Jackson, extended some forbearance to them. If he has proved the first point, that the note was left to secure the whole indebtedness, and either of the latter points, — either that it was a valid note, or that he extended some forbearance to Phinney, if it was an accommodation note, — then he is entitled to recover. . . . Now, on the matter of forbearance, it is not necessary that any specific time should be agreed upon between Phinney and Smith during which Smith should forbear to sue; if he went to him and said, 'Unless you give me collateral security for this note I shall sue and attach your property,' and in consequence of that statement this collateral was given, and he did forbear to sue, that is a sufficient consideration for the taking of this collateral, and Smith, under these circumstances, in taking the note would be considered a *bona fide* holder for value."

Under this instruction, the jury were authorized to find a valid contract on the part of Smith to forbear a suit against Phinney and Jackson, without any promise on his part to do so, but that the delay to bring an action was sufficient.

We think this was error. Without a promise to forbear, Smith deprived himself of no right or remedy against Phinney and Jackson. To constitute a legal contract to forbear there must be a valid promise to do so, so that for some time the holder of the debt has no right to maintain an action on it. It is not sufficient to show that he did forbear: *Mecorney v. Stanley*, 8 Cush. 85; *Robinson v. Gould*, 11 Cush. 55; *Manter v. Churchill*, 127 Mass. 31; *Berry v. Pullen*, 69 Me. 101; 81 Am. Rep. 248; *Turner v. Williams*, 73 Me. 466; *Lambert v. Clewley*, 80 Me. 480.

The rule which requires some new consideration to protect the indorsee who takes the note as collateral for a pre-existing debt, against such a defense as is set up here, is admitted as the settled law of this state when the note in suit was made: *Smith v. Hiscock*, 14 Me. 449; *Nutter v. Stover*, 48 Me. 169. But it is claimed by the counsel for the plaintiff that it is in conflict with the rule established by the federal courts, the court of Massachusetts, and many of the other states, which is well shown by the many authorities cited in their brief; and they urge the court to overrule the cases in this state, and

establish here the rule held by them which requires no new consideration, and thereby bring this state in accord, upon this question of commercial law, with what is claimed to be the rule established by the greater weight of authority. If the question was an open one here we should be inclined to adopt the federal rule as the one best sustained by principle and authority.

But it has been so long settled the other way, and acted upon in this state, we do not feel that we should be justified in reversing it.

Exceptions sustained.

TAKING A BILL OR NOTE AS COLLATERAL SECURITY. — The assignee of negotiable paper, in good faith, before maturity, as collateral security for a pre-existing debt, due from payee, is not a holder for value in the usual course of trade, and takes it subject to all the equities which exist against the payee in favor of the maker at the time of the assignment; but it is otherwise if he parts with a new consideration: *Ruddick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Depeau v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216; *Cullem v. Branch Bank*, 4 Ala. 21; 37 Am. Dec. 725; *Roxborough v. Messick*, 6 Ohio St. 448; 67 Am. Dec. 346; *Richardson v. Rice*, 9 Baxt. 290; 40 Am. Rep. 92; *Craighead v. Wells*, 8 Baxt. 38; 35 Am. Rep. 685; *Coddington v. Ray*, 20 Johns. 637; 11 Am. Dec. 342.

FORBEARANCE TO SUE MAY CONSTITUTE A SUFFICIENT CONSIDERATION: *Jennison v. Stafford*, 1 Cush. 168; 48 Am. Dec. 595, and cases cited in note.

GREGOR v. CADY.

[82 MAINE, 181.]

LANDLORD IS UNDER NO DUTY TO REPAIR LEASED PREMISES unless he has covenanted to do so, and his promise to make repairs thereon is without consideration, and no action can be sustained because of his non-performance.

NEGLECTENCE. — LANDLORD UNDERTAKING TO REPAIR LEASED PREMISES AT THE REQUEST OF HIS TENANT, when under no obligation so to do, and who assures his tenant that such repairs have been made, is answerable to the tenant if the latter, relying on such assurance, suffers injury by reason of the defects not being properly repaired.

FOR NEGLIGENCE IN THE PERFORMANCE OF A GRATUITOUS UNDERTAKING through which damages ensue to the other party, an action lies.

ACTION by a tenant against his landlord. On the trial the judge instructed the jury as follows: "It does not appear, either from the lease or from any arrangement entered into at the time between the parties, that either party was under any obligation to make repairs on the premises. In the absence of any original stipulation in the contract, as to who shall

make repairs, the law places the duty upon the tenant, and not on the landlord. In other words, when the owner of the property lets it to a tenant, the tenant takes the property as it is. It is presumed that he examines the premises, and in the absence of any stipulation to the contrary, the tenant takes the premises as they are, and if any repairs are to be made, the duty devolves upon him. As a consequence of this principle of law, if a tenant is injured on the premises during the existence of the tenancy, by their defective condition, the tenant must suffer the loss, unless one of three states of facts exists. If the fact should appear that there was some trap, some weak condition of parts of the premises, known to the landlord, and the existence of which was not communicated to the tenant, and not known by him, then, in case an accident happened from such defect, the landlord would be liable, on the ground that he was guilty of deceit in not communicating the existence of such hidden trap or defect to the tenant. In this case, the plaintiff claims that she was injured by the fall of a privy floor; but there is no testimony here that either she or the defendant knew of the defective condition prior to the accident. Consequently, the plaintiff cannot recover on this branch of the case, because there is no testimony tending to show that Hannah or Darby Cady knew of the weak condition of the privy and failed to communicate it to the plaintiff before the injury occurred. Another state of facts upon which the plaintiff can recover in an action like this, even though there is no stipulation as to repairs, is, where there is a warranty on the part of the landlord that the premises are safe or will be safe during the tenancy. Now, there is no warranty in this instrument that this tenement shall be safe for this family during the continuance of the tenancy; there is no warranty, either express or implied, that the premises shall be safe as long as the plaintiff or her husband shall occupy them. Consequently, the plaintiff cannot recover under that exception. But the third exception under which the plaintiff can recover, even though there is no stipulation in the lease as to who shall make the repairs, is this: If the landlord's attention is called to the weak and defective condition of any part of the premises, and he assumes and pretends to make repairs, then he is held to the ordinary rule of reasonable care in making those repairs. Now, the plaintiff admits that in the original contract of lease there is no provision by which the landlord was to keep the premises in repair; but she claims that during the

continuance of the tenancy she notified the agent of the defendant that the barn and bridge thereto were in a defective and weak condition. She claims that in response to that demand the defendant or her agent pretended to repair the premises, but did not exercise reasonable care, and that in consequence of his failure to make the repairs which he pretended to make, she was injured. Now, if such was the fact, although there is nothing in the lease providing that the landlord shall make the repairs, still, if during the continuance of the tenancy his attention was called to the defective condition of the premises, and he did assume and pretend to repair them, and notified her that they had been repaired, and relying upon his statement that the defects had been repaired she was injured, then she would be entitled to recover compensation for the injury she thereby sustained." Verdict for the plaintiff. Defendant moved for a new trial because the verdict was contrary to the law and evidence, and the damages were excessive.

W. H. Looney, for the defendant.

George Libby, for the plaintiff.

VIRGIN, J. In August, 1887, the defendant leased in writing to the plaintiff a second-story tenement, including a shed and privy attached, to which access was had by a bridge from the kitchen. Subsequently, but prior to March, 1888, the attention of the lessor was called to the rickety condition of some portion of the premises, especially the bridge, and he, with a carpenter, made repairs of the bridge. On March 14, 1888, while the plaintiff was in the privy, the floor gave way, whereupon she, in falling, seized hold of the door-stool to prevent herself from going down several feet into the vault, and was severely injured, for which the jury returned a verdict for \$825. The defendant, without finding any fault with the amount of the verdict, seeks to have it set aside as being against law and evidence.

It is common knowledge among the members of the profession that no duty on the part of a landlord to repair leased premises arises out of the relation subsisting between him and his tenant; and in the absence of any covenant on his part in the lease that the premises are in proper repair, he is under no legal obligation to make repairs; but the tenant, on the principle of *caveat emptor*, and in the absence of any fraud

on the part of the landlord, takes them in the actual condition in which he finds them, for better and for worse.

Moreover, any subsequent promise by the landlord to repair is without consideration, and no action of *assumpsit* will lie for his non-performance of such a promise: *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229.

But while it is generally true, with respect to gratuitous contracts, that for non-feasance no action lies, still, for misfeasance an action on the case may be maintained, inasmuch as "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it": Smith's note in *Coggs v. Bernard*, Smith's Lead. Cas., 6th Am. ed., 355. "A distinction exists between non-feasance and misfeasance, — between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it. . . . If a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which damage ensues to the other party, an action will lie for this misfeasance": 2 Kent's Com. 570; *Thorne v. Deas*, 4 Johns. 96-99; *Balfe v. West*, 13 Com. B. 466; 76 Eng. Com. L.; *Elsee v. Gatward*, 5 Term Rep. 143, 149, 150; *Wilson v. Brett*, 11 Mees. & W. 118, 115; 16 Am. Jur. 261 et seq.

This established principle is applicable to the case at bar. And although the lessor's attention, after possession taken by the lessee, was called by the latter to the rickety condition of a portion of the premises, and he thereupon agreed to repair it, still, he was under no legal obligation to fulfill his promise. But when, upon the request of the lessee, the lessor gratuitously undertook to make the repairs, and negligently and unskillfully performed the work, whereby the lessee was subsequently injured, the lessor became liable by reason of his misfeasance, provided he undertook to repair the particular part of the premises to which his attention was called, and where the injury occurred: *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, which is on all fours with the case at bar.

Such was the substance of the charge of the learned judge on this point.

But the defendant contends that no complaint was made in regard to the privy, and that she did not undertake to repair that, — but did repair the bridge.

The presiding judge called the attention of the jury to this

question of fact, and left the question to them to decide, which issue they must have found for the plaintiff. We think the evidence preponderates in behalf of the defendant; but there is evidence on which the verdict can rest.

Motion overruled.

LANDLORD AND TENANT — LANDLORD'S DUTY TO REPAIR LEASED PREMISES. — The landlord is under no obligation to repair leased premises: *Siebel v. Blane*, 76 Cal. 173; unless he makes a covenant to that effect: *Riley v. Pettie County*, 96 Mo. 318. The landlord, without the existence of a covenant to repair, is not liable to third parties injured by reason of the non-repair of the leased premises: *Johnson v. McMillan*, 69 Mich. 34.

FURGERSON v. STAPLES.

[82 MAINE, 156.]

A TOWN ORDER, although not negotiable paper to the extent that a transfer to an innocent holder shuts out equitable defenses, may be negotiable in form, and become transferable under the same rule of law that would be applicable to negotiable paper.

INDORSER OF A FORGED OR VOID NOTE may be sued for the consideration paid to him, or he may be held as a party, without demand and notice.

INDORSER OF A TOWN ORDER, VOID BECAUSE ISSUED WITHOUT AUTHORITY, IS ANSWERABLE to his indorsee, in an action for money had and received, for the amount paid by the latter to the former therefor.

ACTION by plaintiff, as surviving partner of Otis & Co., to recover the consideration paid by that firm to the defendant for three over-due town orders, which, after such transfer, were adjudged by this court to be void.

W. H. Foyler, for the plaintiff.

N. H. Hubbard, for the defendant.

HASKELL, J. The defendant, upon payment of three thousand dollars to the municipal officers of the town of Stockton, received from them three town orders for one thousand dollars each, dated November 17, 1877, payable to his own order, with interest annually, and already accepted by the treasurer of the town.

On the 17th of January, 1879, the defendant indorsed one year's interest upon each of the orders, and indorsed and delivered the orders to the plaintiff for value, and in good faith, both parties believing them to be legal obligations of the town.

The orders have been held by this court as issued without authority from the town, and therefore of no binding validity

upon it. The plaintiff sues in *assumpsit* to recover the consideration that he paid the defendant for the orders, as money had and received, and interest.

Town orders, although not commercial paper to the extent that transfer to an innocent holder shuts out equitable defenses, may be negotiable in form, and become transferable under the same rules of law that would be applicable to commercial paper: *Parsons v. Monmouth*, 70 Me. 262.

The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is, upon proper presentment, demand, and notice; he engages that it is genuine and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it: Story on Promissory Notes, sec. 185; Daniel on Negotiable Instruments, sec. 669; *State Bank v. Fearing*, 18 Pick. 533; 28 Am. Dec. 265; *Prescott Bank v. Caverly*, 7 Gray, 217; 66 Am. Dec. 473.

All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity of the note when it is voidable only, are absolute warranties, and not dependent upon any condition whatever. If the note transferred by indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consideration paid him, or he may be held as a party without demand and notice: Daniel on Negotiable Instruments, secs. 669, 675, 1113; *Parsons on Notes and Bills*, 444; *Copp v. McDugall*, 9 Mass. 1; *Burrill v. Smith*, 7 Pick. 291.

The indorsement and transfer by the payee of a dishonored promissory note for value must create all the engagements on the part of the indorser that an indorsement of the note before maturity would create, except as to demand and notice. To charge the indorser of a dishonored note, demand and notice are required within a reasonable time after the indorsement. The indorsement in such case is like the indorsement of the demand note of the maker of that date, or the drawing of a bill upon the maker of the note payable to the transferee: *Greely v. Hunt*, 21 Me. 455; *Hunt v. Wadleigh*, 26 Me. 271; 45 Am. Dec. 108; *Sanborn v. Southard*, 25 Me. 409; 43 Am. Dec. 288; *Goodwin v. Davenport*, 47 Me. 112; 74 Am. Dec. 478; 2 *Parsons on Notes and Bills*, 13.

The plaintiff has elected to sue for the consideration that he paid the defendant for the worthless orders. The plaintiff has already recovered from the town, by an action for money

had, and received, brought in the defendant's name, the part of the money defendant loaned upon the order that went to the use of the town. This sum the plaintiff must deduct from the amount that he paid the defendant for the orders, and have judgment for the balance, and interest.

Defendant defaulted. Damages to be assessed at *missi prius*.

TOWNSHIP ORDER IS NOT A NEGOTIABLE INSTRUMENT in Pennsylvania, so as to entitle the holder to bring suit thereon in his own name: *Township of Snyder v. Board*, 122 Pa. St. 442; 9 Am. St. Rep. 118.

ORDER DRAWN ON THE COUNTY SUPERINTENDENT BY SCHOOL TRUSTEES is not a negotiable instrument in the sense that an innocent holder for value is protected against infirmities in its origin: *Shakespeare v. Smith*, 77 Cal. 628; 11 Am. St. Rep. 337.

INDORSERS OF FORGED NEGOTIABLE PAPER are liable to subsequent holders, without presentment for payment or notice of non-payment: *Turnbull v. Bosper*, 40 N. Y. 456; 100 Am. Dec. 523.

THURLOW v. WARREN.

[82 MAINE, 164.]

EXEMPTION FROM EXECUTION. — PARTNERS are not entitled to have any of the partnership property set aside as exempt from execution.

E. P. Spofford, for the plaintiffs.

G. M. Warren, for the defendant.

VIRGIN, J. Replevin of a "pair of oxen," by a partnership duly adjudged insolvent, against the assignee of the estate. The only question is, whether the oxen owned by the firm were exempt from attachment and seizure on execution.

Whether the particular business of the partnership was such as required the use of oxen does not appear. But even assuming that the "pair of oxen" replevied to have been (in the language of R. S., c. 81, sec. 62, cl. 7) "a pair of working cattle" actually used in and about the firm's business, we are of opinion that they were not exempt. Joint debtors are not within the letter of the statute. The language of the whole ten clauses of the Revised Statutes, chapter 81, section 62, specifying the property exempted, is predicated upon the idea that the beneficiary is an individual. Exemption therein provided is recognized as the privilege of an individual, and not of a firm or other joint association or corporation. No suggestion of partnership or other joint ownership appears in the

statute. The single "debtor," "he," "himself," and "his family" are the terms adopted. The clause under which this case falls provides, "If he has more than one pair of working cattle, he may elect," etc., with several like uses of the singular pronoun: R. S., c. 81, sec. 62, cl. 7. It would seem, therefore, that the property which can claim exemption from writ and execution must be owned in severalty, and not jointly.

The various insuperable difficulties in attempting to apply exemption to the property of a partnership are very clearly pointed out in *Pond v. Kimball*, 101 Mass. 105.

Moreover, although in some jurisdictions the contrary view is taken, still the great weight of deliberate and well-considered cases holds that individual, and not partnership, property is exempt: *Pond v. Kimball*, 101 Mass. 105; *Bonsall v. Comly*, 44 Pa. St. 442; *Guptil v. McFee*, 9 Kan. 30; *In re Handlin*, 8 Dill. 290; *Russell v. Lennon*, 39 Wis. 578; 20 Am. Rep. 60; overruling *Gilman v. Williams*, 7 Wis. 886; 76 Am. Dec. 219, cited by the plaintiff; *Parsons on Partnership*, 314. Hence, in accordance with the agreement of the parties, the entry must be, judgment for defendant for two hundred dollars, and interest from date of writ, with full costs.

EXEMPTION FROM EXECUTION — PARTNERSHIP PROPERTY. — Partners cannot claim as exempt from execution any partnership assets: *State ex rel. Billingsley v. Spencer*, 64 Mo. 355; 27 Am. Rep. 244, and particularly note 246-250; *Cowson v. Creditors*, 77 Cal. 403; 11 Am. St. Rep. 294, 297. Compare *Ossille v. Bentley*, 76 Mich. 248; 15 Am. St. Rep. 312.

KINGSLEY v. McFARLAND.

[82 MAINE, 281.]

FIXTURES. — BUILDINGS PLACED ON LAND BY ONE IN POSSESSION THEREOF UNDER A CONTRACT OF PURCHASE become a part of the realty, in the absence of any agreement to the contrary made with the owner of the land, and the latter is entitled to recover them from one who took a chattel mortgage thereof from the person so in possession, with full notice of all the circumstances.

Wiswell, King, and Peters, for the plaintiff.

G. P. Dutton, for the defendants.

VIRGIN, J. Writ of entry to obtain possession of a certain parcel of land at Bar Harbor, with the buildings thereon, comprising a two-story dwelling-house and stable. The defendants do not contest the plaintiff's title and right of possession

of the land, but claim that the buildings are personal property, the defendant Phillips's alleged title being under a mortgage from the other defendant.

A careful examination of the reported evidence satisfies us of the following facts: The plaintiff, owning the land in question, in the early part of 1888 orally agreed to sell it for six thousand dollars to McFarland, who agreed to pay that sum therefor, and to move thereon the L of a certain hotel, and make it into a boarding-house; and then, upon receiving a deed from the plaintiff, McFarland was to give back a mortgage to secure the payment of the whole purchase-money. Under this agreement, McFarland entered into possession. The L was moved on, some fifteen feet added thereto, and finished off into a boarding-house, with a piazza extending the entire length of one side and across one end. Like most of the buildings there, this one rested on fifty cedar posts, was boarded down into the ground, and connected with the sewers and water-pipe. A stable was also erected, standing on stone piers.

McFarland hired money of his co-defendant, Phillips, with which to purchase and move the L, and for security gave him a chattel mortgage thereof, dated March 8, 1888, and recorded March 10th. As to the location of the L when the mortgage was given, the evidence is somewhat conflicting. McFarland testifies that it was given "before the L was started"; Phillips, "while it was in process of moving." But the mortgage itself describes the building as then on the land in question, and the disinterested witness, Lord, called to the premises on March 4th, by McFarland, to estimate the cost of completing the building, testifies that on March 4th (four days before the date of the mortgage) "the building was on the land as it is now, all moved." In May, after the stable was erected, McFarland mortgaged it as a chattel to Phillips. Our conclusion is, that the house was mortgaged after it was on the land.

It is undisputed that Phillips knew that the L was to be moved onto the lot when McFarland purchased it, and evidently understood, as did the other parties, the purpose and object of the removal.

Under these circumstances, we can have no doubt that these buildings became a part of the realty, and could neither be attached nor mortgaged as the personal property of McFarland, against the objections of the plaintiff; for, generally, buildings of a permanent character are a part of the realty, and belong to the owner of the land on which they stand: *Milton v. Colby*, 5

Met. 78, 81; *Howard v. Fessenden*, 14 Allen, 124, 128; *Westgate v. Wixon*, 128 Mass. 304, 306. They can be held by another as personal property, with the right of removal only under some agreement with the owner of the land. If erected voluntarily, and without any contract, express or implied, with the landowner that they shall not become part of the realty, but shall remain personal, they become part of the realty, and belong to the owner of the soil: *Hinkley etc. Co. v. Black*, 70 Me. 473, 481, and cases there cited. There is no pretense of any express agreement on the part of the plaintiff that the buildings were to remain the personal property of McFarland. He was not like a stranger, without any interest in the land, who erects buildings on the land of another with the latter's consent, from which might readily be implied an understanding that they could be sold or removed by the builder: *Osgood v. Howard*, 6 Me. 452; 20 Am. Dec. 822; *Russell v. Richards*, 10 Me. 429; 25 Am. Dec. 254; *Pullen v. Bell*, 40 Me. 814, as explained in *Lapham v. Norton*, 71 Me. 86, 87. But on the contrary, he was in possession under an agreement to purchase, having an equitable interest therein, therefore, and the plaintiff was to convey to him the land under certain conditions; and the relations of the parties were not such as that the law would imply any agreement that the buildings were to remain personal property: *Westgate v. Wixon*, 128 Mass. 304. Both parties evidently contemplated the completion of the contract, and McFarland intended the buildings as an improvement upon the land which he expected to own, and the plaintiff as additional security of the purchase-money of the land which he expected to convey: *Lapham v. Norton*, 71 Me. 88.

As Phillips made advances on the L with full knowledge of what use was to be made of it, and took a mortgage after it was made a part of the realty, we think his mortgage cannot avail him. And the same principle applies to the stable.

Judgment for the plaintiff, for premises described in the writ, including the buildings.

FIXTURES AS BETWEEN VENDOR AND VENDEE. — Buildings and structures attached to land by one in the possession thereof under a contract of purchase, where he fails to perform his part of the contract and acquire title, are part of the realty, and cannot be removed by him: *Hinkley etc. Co. v. Black*, 70 Me. 473; 35 Am. Rep. 346, and foot-note. But it has been otherwise decided where the vendor, the vendee not being in fault, repudiated an oral contract of sale, and took possession of a house erected upon the land by the vendee: *Waters v. Reuber*, 16 Neb. 99; 49 Am. Rep. 710.

HARR V. MCINTIRE.

[22 MAINE, 342.]

CONSTRUCTION OF STATUTE. — Statute enacting that persons engaged in blasting rocks shall before each explosion give seasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance, and that whoever violates the law is liable for all damages caused by the explosion, does not give a remedy to workmen employed in the quarry, but was designed only for the protection of persons who, not being engaged in or about the quarry, and being therefore ignorant of their proximity to danger, are in need of warning to retire to a place of safety.

▲ **SERVANT IS ANSWERABLE TO A FELLOW-SERVANT INJURED BY HIS NEGLIGENCE.** — Where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty, resulting from their relation of fellow-servants, to exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances, and he who fails in that respect is responsible for the resulting physical injury to his fellow-servant.

ACTION by a stone-cutter against a ledge-man in charge of blasting. The plaintiff claimed that he had sustained injuries by reason of a blast fired by the defendant, in a granite quarry, of which blast the defendant gave no notice.

J. E. Moore, for the plaintiff.

C. E. Littlefield, for the defendant.

VIRGIN, J. An action by one workman in a granite quarry, against his fellow-workman, to recover damages for a personal injury alleged to have been caused by a rock thrown from a blast discharged by the defendant. The case comes up on a report of the evidence; and if the action is maintainable, it is to stand for trial for the assessment of damages.

The action is founded on the Revised Statutes, chapter 17, sections 23 and 24, the material provisions of which — including the words in brackets, found in the original act of 1852, chapter 257 — are as follows: —

“23. Persons engaged in blasting lime rock or other rocks shall, before each explosion, give seasonable notice thereof, so that all persons or teams [that may be] approaching shall have [a reasonable] time to retire to a safe distance from the place of said explosion.

“24. Whoever violates the preceding section . . . is liable for all damages caused by an explosion [when seasonable notice thereof was not given]; and if the persons engaged in blasting rocks are unable to pay, or after judgment and execu-

tion avoid payment by the poor debtor's oath, the owners of the quarry in whose employment they were are liable for the same."

Is this statutory remedy intended to apply to workmen in quarries?

A literal construction of the words "all persons" would doubtless include them. Still, when read in connection with the other clauses of the statute, we do not think the legislature so intended. "Persons that may be approaching" seem rather intended to apply to those only who are not engaged in and about the quarry, and who, therefore, being ignorant of their proximity to danger, are seen coming within the danger line, instead of including with them such persons also as are constantly engaged there, and have personal knowledge of what is taking place there. That clause apparently limits the remedy to such outsiders as might unsuspectingly be approaching within the possible range of the blast, and the object of the "seasonable notice" to them is, "so that they and their teams may have a reasonable time to retire to a safe distance."

Moreover, if the real intention of these provisions, derived from their language alone, left any doubt on this question, it is entirely removed by the further consideration that the other construction would make it in derogation of the common law; and to warrant such a result the intention should be clearly expressed: *Dwelly v. Dwelly*, 46 Me. 377; *Carle v. Bangor etc. Canal & R. R. Co.*, 43 Me. 289.

By the universally acknowledged rule of common law, when an employee of age and intelligence enters another's service, he is presumed to understand, and therefore, as between himself and his employer, and in the absence of any agreement to the contrary, to assume all the ordinary risks incident thereto, and to measurably predicate his wages upon the extent of the perils he is to encounter and assume, among which are those which he knows are more or less likely to occur through the occasional negligence of his co-employee. And as it is utterly impracticable for the employer to absolutely prevent such negligence, and the best thing he can do in that direction is to employ such prudent workmen as are least likely to act negligently, therefore, if he has used proper care in respect of their selection, the employer is not responsible to any one of them for an injury resulting from the negligence of any other. But if the statute in question is intended to include workmen in quarries, then this long-

established salutary rule of the common law is thereby reversed; for the statute expressly makes the employers liable for an injury occasioned by the negligence of a fellow-servant, if the one who causes it is unable to pay, or avoids. If such a radical change of the law governing the duties and liabilities of employers to their employees had been in the mind of the legislature, we think the law-makers would have clearly and directly expressed such intention, and even not limited it to workmen in quarries, but extended it to other kinds of business involving more or less danger, and in which large numbers of employees are engaged.

This view finds apposite illustration in a decision of this court construing a statute defining the liability of railroad companies. Chapter 81 of the Revised Statutes of 1841, after providing for the erection of sign-boards and gates, and stationing agents at crossings and fixing penalties for non-compliance therewith, continued as follows: "Every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the foregoing section or of any other neglect of any of their agents, or by any mismanagement of their engines, in an action on the case by the person sustaining such damages": R. S. 1841, c. 81, sec. 21. In an action by an employee against a railroad company to recover damages for an injury caused by another employee the court, in deciding that the statute did not apply, says: "Notwithstanding the literal construction of the statute might entitle a servant to recover for injuries occasioned by the fault of a fellow-servant, still such a construction is wholly inadmissible. Statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law"; and after expressing the opinion that the statute was not intended to change the nature of contracts between such corporations and their servants, the court continues: "If such had been the intention, we think it would have been more plainly or directly expressed. The words 'any person' must be limited in their application to such persons as were not servants of the corporation, leaving such servants, who are presumed to have arranged their compensation with their eyes open, and to have assumed the relation with all its ordinary dangers and risks, without any remedy against the corporation, for such injuries as may be incident to the service they have engaged to perform": *Carle v. Bangor etc. Canal & R. R. Co.*, 43 Me. 269.

Can the action be maintained at common law?

Some of the elementary writers seem inclined to the opinion that one servant is not liable to a fellow-servant for negligence: Wharton on Negligence, sec. 245; Wood on Master and Servant, sec. 325. To maintain his action, the plaintiff must prove some contract or obligation, from which, in legal contemplation, arises a duty the breach whereof is alleged against the defendant, or facts establishing such a relation between himself and the defendant that such a duty will thence result,—together with a breach thereof: Broom's Commentaries, 670.

There is no subsisting contract between fellow-servants, and neither receives any compensation from the other. Neither is a party to or has any interest or privity in the other's contract with their common master. Their separate, independent contracts with him are only material as showing that they are individually rightfully on the premises, and engaged in the performance of their service there. The action cannot therefore be founded on any contract, but if at all, on the defendant's misfeasance, which, even if it could be deemed a breach of his contract with his master, would not for that reason exempt him from liability to others injured thereby, provided such misfeasance was a violation of a duty springing from the relation between them. And we are of opinion that where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty, resulting from their relation of fellow-servants, to exercise such care in the prosecution of their work as men of ordinary prudence usually use in like circumstances; and he who fails in that respect is responsible for a resulting personal injury to his fellow-servant. Such a liability would necessarily have a salutary influence in inducing care on their part.

The great weight of authority lies in this direction. Thus where the plaintiff sued a railroad company to recover damages for the death of her husband, one of its employees, killed by the negligence of one of the defendants' engine-drivers, Barons Pollock and Huddleston, while they exempted the company because the death was caused by a fellow-servant, said: "It is clear that an action would well lie against the driver of the engine, by whose negligent act the death was occasioned": *Swainson v. North E. Ry Co.*, L. R.

3 Ex. D. 841, 848. A like *dictum* was made by Baron Alderson in *Wigget v. Fox*, 11 Ex. 882, 889, and by Baron Bramwell in *Degg v. Midland Ry Co.*, 1 Hurl. & N. 773, 780. And it has been directly adjudicated in *Wright v. Roxburgh*, 2 Ses. Cas. S., 3d series, 748; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacher*, 66 Ind. 547; 32 Am. Rep. 114; *Griffiths v. Wolfram*, 22 Minn. 185; and in *Osborne v. Morgan*, 180 Mass. 102, 89 Am. Rep. 437, which last case expressly overrules *Albro v. Jaquith*, 4 Gray, 99; 64 Am. Dec. 56. The contrary doctrine "is not only destitute of sense," says the eminent author of Thompson on Negligence, "but it involves the monstrous conclusion that one servant owes no duty of exercising care to avoid injury to his fellow-servant": 2 Thompson on Negligence, 1062; see also Addison on Torts, sec. 246; Shearman and Redfield on Negligence, sec. 144.

Facts: In September, 1882, the defendant, a quarry-man of twelve years' experience, was engaged in opening a new place in the quarry, by blasting off the outside layer of soft stone so as to uncover those fit for use which lay beneath in sheets about two feet thick. He sank his first hole fifteen inches deep in the front edge of the top layer, and charged it with "a little more than half a pound of powder." Next north was a table-rock six or seven feet high. South, southeast, and southwest of this place of blasting were two tiers of long, narrow sheds extending easterly and westerly, seven or eight feet high, divided into bands, where quarried rocks were shaped and dressed. These sheds had narrow doors in each end, for ingress and egress, with two sets of doors on their north and south sides, the lower ones two and a half feet wide, and so constructed as to be taken out, and the upper ones three and one half feet wide, hung at their upper edges by hinges, and were opened by being swung upward.

The plaintiff was a quarry-man and stone-cutter. He had out stone there in May and June, and after working July and August in the crew of one who then had charge of blasting, he returned to cutting again in September, when he was engaged in the extreme west end of shed No. 3, 265 feet south of the place of blasting. The north-side doors — toward the blast — were closed to keep out the north wind, while the upper south door was open, and the lower one closed. When the blast exploded, a piece of rock weighing about ten pounds came through the north wall of the shed, above the closed upper door, and hit the plaintiff's back, while in a stooping

attitude, and thence out of the south open door to an iron rail, where it broke.

The injury caused by this rock is the foundation of the action; and the particular complaint is, that no notice was given to the plaintiff previous to the firing of the blast.

A careful examination of the mass of evidence reported satisfies us that the general notice usually given when a small blast is to take place was seasonably given, to wit, a cry of "fire" three times, made with short intervals of time between them, before applying the fire, and that the explosion did not take place for several minutes thereafter. It also appears that when heavy blasts, which seldom occur, with twenty-five to fifty pounds of powder, are made, the custom is to send word to the several sheds. Frequently, when light blasts are fired, many workmen, on hearing the alarm, go into the sheds for protection, and those already in remain, and hence has grown up a sort of careless feeling of security on their part.

The plaintiff and some others in the same shed testify that they heard no alarm, accounted for, perhaps, by reason of the din of their hammers, and the fact that the doors on the side next to the blast were closed. Still, others in the same direction, and much farther away, distinctly heard it.

But we think the plaintiff mistook his form of remedy, and that the real fault of the defendant was not in failing to give sufficient notice, but in not sufficiently covering the blast. It is absurd to say that rocks from a blast properly covered will fly as did those which rained down upon shed 3, one of which went through its board wall. The gross carelessness of such omission appears upon its face,—*res ipsa loquitur*. But there is no such claim in the declaration, and evidence thereof was therefore excluded. Neither is there any allegation, in terms, of negligence on the part of the defendant, or due care on the part of the plaintiff. We are of opinion, therefore, that this action is not maintainable.

Plaintiff nonsuited.

ONE SERVANT IS ANSWERABLE TO HIS FELLOW-SERVANT for injuries occasioned by his negligence: Note to *Albro v. Jaquith*, 64 Am. Dec. 58-60.

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DOLLOFF v. PHENIX INSURANCE COMPANY.

[82 MAINE, 268.]

INSURANCE — FORFEITURE FOR FALSE SWEARING. — Though the actual loss, truly stated in the proof of losses, exceeded the whole amount of the insurance, a knowingly and purposely false statement, under oath, of other pretended losses, will destroy plaintiff's claim for his actual loss, under a policy containing a stipulation that "any fraud, or attempted fraud, or false swearing on the part of the assured shall cause the forfeiture of all claims under this policy."

INSURANCE — FRAUD IN ANY PART OF A FORMAL STATEMENT OF LOSSES taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he has destroyed his actual claim by his false swearing.

INSURANCE — CONSTRUCTION OF STATUTE. — A statute enacting that immaterial and innocent misstatements shall not avoid a policy of insurance refers to statements made in procuring the policy, and does not relieve the assured from a forfeiture incurred by his knowingly making a false statement, under oath, in his proofs of loss.

E. W. Whitehouse, for the plaintiff.

Baker, Baker, and Cornish, for the defendants.

EMERY, J. The plaintiff procured of the defendant insurance company a policy of fire insurance for two thousand dollars upon his home buildings and contents, each building being separately valued, and the contents also having a separate valuation. The policy of insurance contained the following stipulation: "Any fraud, or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claims under this policy." The buildings and contents were consumed by fire, and the plaintiff, as required by the policy and also by statute (R. S., c. 49, sec. 21), notified the company of the loss, and delivered to them a written statement on oath, purporting to be a particular account of the loss and damage. In this instrument, called "proof of loss," the plaintiff, as the jury have found, knowingly and purposely made false statements, on oath, of some pretended losses which he did not in fact sustain.

He contended, however, that his actual losses, throwing out his pretended losses, exceeded the whole amount of the policy, and that consequently the defendant company were not and could not be harmed by his false statement of additional losses, and should pay him his actual loss.

His argument was, that these false statements of additional losses did not increase the risk or the liability of the com-

pany; that the true statements showed a loss of over two thousand dollars, and hence the false statements did no fraud nor harm. The presiding justice overruled this contention, and instructed the jury to the opposite effect. The verdict being against him, the plaintiff excepted, and his exceptions present, substantially, this question: When the actual losses, truly stated in a proof of loss, exceed the whole amount of the insurance, will a knowingly and purposely false statement on oath, in the proof of loss, of other pretended losses, destroy the plaintiff's claim for his actual losses under such a policy as this?

We cannot doubt that it will. The parties stipulated that it should. It is so provided in the contract, and it is a lawful provision. The contract of insurance is one of indemnity only. The sole lawful object of obtaining a policy of insurance is to secure simple reimbursement for actual loss. Any purpose of making a profit on the part of the assured is unlawful, and will vitiate the contract. Such being the nature of the contract, it requires good faith on the part of the assured toward the insurers. Especially is this so in the adjustment of the loss after a fire. It is impracticable for the insurers to ascertain for themselves the extent of the losses, particularly where the contents of a dwelling-house and barn are insured, as in this case. The assured and his family, or servants, are usually the only persons who can give a true account of the losses. The insurers therefore usually, as in this policy, require from the assured a detailed statement on oath, of such losses, as a necessary preliminary to the payment of the indemnity. The statute also requires this: R. S., c. 49, sec. 21. The statute and the policy both make this statement a necessary preliminary to a right of action on the policy, and they both contemplate, of course, a true statement. The demand of the statute and of the policy for such a statement is addressed to his conscience, like a bill for discovery. When, therefore, he meets this demand with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy.

The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his

false claim: *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401; *Wall v. Howard Ins. Co.*, 51 Me. 32.

We have not overlooked the case of *Shaw v. Scottish Com'l Ins. Co.*, 1 Fed. Rep. 761, where Judge Lowell makes the distinction contended for by the plaintiff here. There the stipulation in the policy was: "All fraud or attempt at fraud, by false swearing, etc." Here the words are: "Any fraud, or attempt at fraud, or false swearing, etc." It might be that there harmful fraud should appear, while here false swearing, by itself, is made a cause for forfeiture. But it will be seen that the United States supreme court, in *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, three years after Judge Lowell's opinion, considered the same question, and decided it the other way, holding that false swearing alone, without its operating as a fraud upon the company, forfeited the policy.

The plaintiff invokes section 20 of chapter 49 (the insurance law), Revised Statutes; but that does not rescue him. It does not purport to save the assured from the consequences of his own fraud. It simply provides that immaterial and innocent misstatements shall not avoid the policy. If the statements called for in that section are material or fraudulent, they are fatal. But that section has reference only to statements made in procuring the policy of insurance. It does not apply to statements made after the loss in the proof of loss. No allusion was made to this statute in *Wall v. Howard Ins. Co.*, 51 Me. 32; but it is uncertain whether the decision was before or after the enactment of the statute. It was intimated in *Bellatty v. Thomaston M. F. Ins. Co.*, 61 Me. 414, some time after the passage of the statute, that fraud in the proof of loss, if established, would bar the suit. While in *Williams v. Phoenix F. Ins. Co.*, 61 Me. 67, the jury negatived any fraud or false swearing, in the over-valuation of the goods, it was assumed that fraud or false swearing, if established, would forfeit all claim under the policy.

It is further suggested by the plaintiff that the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud or false swearing is concerned: *Barnes v. Union M. F. Ins. Co.*, 51 Me. 110; 81 Am. Dec. 562.

Exceptions overruled.

IN THE CASE OF *Johnson v. Continental Ins. Co.*, 39 Mich. 33, the company brought an action in *assumpsit* to recover back money paid by it under a claim of loss under a policy which contained a condition to the effect that all fraud or attempted fraud by false swearing should work a forfeiture of all claim under the policy. The declaration, among other things, alleged that, after the destruction of the property insured, the assured knowingly and fraudulently made and gave to the company, as evidence of the loss to be paid, a false and fraudulent statement and list of the destroyed property. The jury found for the company, upon this allegation. Upon appeal, the court decided that *assumpsit* would lie, without a special count, at the suit of the insurance company, to recover back money paid on a loss under a policy which had been made void by fraudulent representations as to the extent of loss.

SYMONDS v. JONES.

[32 MAINE, 302.]

TRADE-MARKS. — SUCH WORDS AND MARKS as by their own meaning or by association in the public mind indicate, not the quality of an article, but its origin or ownership, the person by whom or the factory in which it was produced, become appropriated in their use exclusively to the originator or owner of such articles. No other person can lawfully use them to designate other similar articles of different origin or ownership.

TRADE-MARKS. — NAME OR INITIALS OF THE ORIGINATOR OR OWNER OF A BUSINESS, when used on labels as trade-marks in the business, may thereby acquire a value, and may be included in the sale of the business, so far, at least, as to prevent the vendor from afterwards using them in like manner on other similar products, to the detriment of the vendee.

TRADE-MARKS. — ONE MAY SELL THE RIGHT TO USE HIS OWN NAME in connection with a particular business.

TRADE-MARKS. — ONE WHO TRANSFERS A BUSINESS AND THE GOOD-WILL THEREOF, including trade-marks, a part of which is his name or initials, and at the same time enters into an agreement by which he is to be employed as manager of the business, has no right, on being discharged as such manager, to enter upon business on his own account and use such trade-marks therein.

TRADE-MARKS — FRAUDULENT USE OF NAME OF ANOTHER. — One having the right to use a trade-mark, a part of which is the name of another, who formerly conducted the business, must not so use it as to lead the public to believe that the former owner still personally conducts such business; and while he so uses it equity will not protect him against such former proprietor who resumes the use of his name in a like business; but such relief will be granted, if, before the complaint is filed, a change has been made in the trade-mark and labels, clearly indicating that the ownership of the business has changed, and that the successor of the original proprietor is conducting it. Especially is this true if the improper use of the trade-mark was inadvertent, or was made by persons for whose conduct the plaintiff is not answerable.

PRACTICE IN EQUITY — NEW PARTIES. — If, pending a suit in equity, the interest of the complainant in the subject-matter is sold to a third per-

sen, the latter may be permitted to come in as party complainant and further prosecute the suit.

TRADE-MARK. — OWNERS OF A TRADE-MARK WHICH INCLUDES THE NAME OF A THIRD PERSON must not so use it, or the labels connected with it, as to lead the public to suppose that the goods on which it is used were manufactured or packed by such third person.

SUIT in equity, in which the defendant was enjoined from using certain labels and trade-marks formerly used by him in carrying on business.

B. F. Hamilton, G. F. Haley, and Arthur Stewart, for the defendant.

W. L. Putnam, for the plaintiffs.

EMERY, J. This is an equity appeal. The material facts found by the court are these: John Winslow Jones, the respondent, for several years prior to 1880 had been carrying on extensively the business of preserving or canning meat, fish, and vegetables at various factories in Maine, New Brunswick, and Prince Edward Island, and had built up a large trade in the canned products in the United States and Canada. The particular process of canning was known as the Winslow process, having been originated by one Isaac Winslow. The business above stated was started by Nathan Winslow & Co., and was succeeded to by the defendant, who greatly extended it. Among the labels used by him to designate the products were two in particular. One was known as the red label, being of a red color, and bearing the figure of an ear of corn, the words "Winslow's Green Corn," and "John Winslow Jones, Portland, Maine," and also the figure of a globe, with the words "World Renowned" and "Trade-mark" thereon. The other was known as the yellow label, being of a yellow color, and bearing the figure of a globe, with the letters "J. W. J." thereon, and the words "Globe Trade-mark Brand," "Winslow's Green Corn," "World Renowned," etc. While these particular labels were used on canned corn, the figure of the globe and the various words and phrases on these labels were used on labels for other products, and on the letter-heads and circulars used in the business.

In the latter part of 1879, Jones procured the organization, in England, of the "J. Winslow Jones and Company, Limited," for the purchasing, carrying on, and further extending the same business; and in pursuance of an agreement, he conveyed to the new company, March 1, 1880, all his said factories, ma-

chinery, and plant generally, and also, as admitted by Jones in his answer, all the labels, trade-marks, and good-will of the business. Jones further admits that such conveyance included the red label and the yellow label, above described.

It was stipulated in the agreement referred to that Jones should be employed by the Limited company as its managing director in America for ten years, at a fixed salary, and should not for the same time carry on a similar business within fifty miles of any factory of the company, nor send any similar canned goods to any part of Europe.

To secure certain debentures, the Limited company made to trustees, Bacon and Herring, a conveyance of all the property received from Jones, including the business, good-will, labels, and trade-marks. The Limited company, subject, of course, to this trust-deed, took possession of all the property and plant conveyed, and carried on the same business, with Jones as managing director in America, until 1882, and during that time made use of the same labels and trade-marks to designate their products. In 1882, the Limited company, becoming financially embarrassed, transferred all the property, plant, and business, including labels and good-will, to Charles P. Mattocks, subject, of course, to the trust deed to secure debentures. It was agreed by the company, the trustees, and Mattocks that the last-named should take charge of the property and carry on the business, which he did, using the same labels and trade-marks to designate the products of the factories so managed by him. This arrangement for Mattocks to take charge of the business was assented to by the debenture holders, including Jones, who was a large holder. In 1883, Mattocks leased the property, plant, and good-will to the Winslow Packing Company, and gave it written licenses to use, during the lease, the labels and trade-marks which had been used in the business. Mattocks was president and manager of this new company. The company used to some extent these red and yellow labels, among others, as they had been before used, until 1885, when they had printed across the face of the labels the words "Winslow Packing Company, successor to."

December 8, 1886, the original trustees under the deeds to secure the debentures transferred the trust, and conveyed all the properties, including good-will and labels, etc., to J. W. Symonds and Edward Moore, the complainants, who there-afterwards held the properties, etc., under the same trust.

After the assignment of the J. Winslow Jones Company, Limited, in 1882, Jones was no longer employed as managing director; and subsequently, as early as 1884, he, at various places in the United States, and within the limits of the trade or custom of the former business, but not within fifty miles of any of its factories, engaged in the same kind of business. In this new business, to designate his new products, he made use of some labels similar in color and style to the old red and yellow labels of the former business. The figure of an ear of corn, the figure of a globe, the words "John Winslow Jones, Portland, Maine," "Successor to Nathan Winslow & Co.," "Winslow's Green Corn," "World Renowned," "Trade-mark," "Globe Brand," and the initials "J. W. J." were used on these new labels. There were some minor differences between the old and new labels, but they were practically similar. Jones also used in his new business practically the same style of letter-heads that he had used in the old business, and which had been used by his assignees, the Limited company, and its successors. The letter-heads had on them the words "Winslow's World Renowned Green Corn," and the figure of a globe, with the words "Trade-mark." Jones also issued circulars, claiming the right to the sole use of the globe trade-mark and the old labels, and denying any right in the assignees of the Limited company.

This conduct of Mr. Jones, as to labels, letter-heads, etc., disturbed the trade and lessened the sale of the product of the old factories, and injured the business of those claiming under his assignees, the Limited company. Whereupon, Messrs. Symonds and Moore, as trustees for the debenture holders, and joining Mattocks and the Winslow Packing Company as parties, filed this bill in equity against Jones, praying for an injunction to restrain Jones from engaging in a similar business within fifty miles of any of their factories, from selling canned goods in Europe, and from using letter-heads or labels similar to or in colorable imitation of those used by him in the old business, and by him sold to the Limited company. The bill also prayed for an account. The court, held by a single justice with the equity powers of a chancellor, sustained the bill, and granted a perpetual injunction, as prayed for, but made no order for accounting. The respondent thereupon appealed to the law court, sitting as an appellate equity court.

All controversies over the facts are settled by our finding of

facts as above stated, and it only remains to consider the legal and equitable principles by which, upon the facts found, the case is to be determined.

Every business man feels a natural and honorable pride in the articles produced by him, and in the business he builds up. He naturally gives some particular name to the product of his invention, of his factories, farms, mines, or vineyards, to distinguish them from similar products of others; and uses peculiar labels and marks upon his products to identify them as his own. The public come to associate these names, labels, and marks with the products of some particular origin or ownership, or of some particular factory, farm, etc. It is clear that such names, etc., thus become convenient for the consumer and valuable to the producer, and that both the consumer and the producer should be protected against their use by other parties upon other similar products. They become valuable according to the familiarity of the public with them, and the excellence of the product designated by them. The law justly recognizes such names, labels, and marks as important attributes or appurtenances of a business, and as proper to be transferred with any sale or transfer of the business and its plant.

Words descriptive of the article or indicative of the general locality of its production cannot, of course, be appropriated by one producer to his exclusive use. Every producer of the same kind of articles can use upon his products any words descriptive of the quality of the articles, or indicative of the county or town where produced, however long time the same words may have been used by others. A man may always describe his products, and tell where they were produced. The same may be said of any color upon a label; for every label must have some color, and the number of colors is limited. Such words and marks, however, as by their own meaning, or by association in the public mind, indicate, not the quality of an article, but its origin or ownership,—the person by whom or the factory in which it was produced,—become appropriated in their use exclusively to the originator or owner of such articles. No other person can lawfully use them to designate other similar articles of different origin or ownership: *McLean v. Fleming*, 96 U. S. 245; *Delaware etc. Canal Co. v. Clark*, 13 Wall. 311; *Goodyear Rubber Co. Case*. 128 U. S. 598; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Godillot v. Harris*, 81 N. Y. 263.

The respondent urges that most, if not all, the words and symbols on the red and yellow labels in question are such as cannot, under the principles above stated, be exclusively appropriated by the complainants as against him. He claims that such of the words and symbols as are generic or descriptive, or do not indicate the origin, or that the ownership is in the complainants, are free to all, and that he cannot be restrained from using them. In this class he places "World Renowned," "Trade-mark," "Only Reliable Brand," etc. The complainants practically concede that such words could not be exclusively appropriated by one producer.

The respondent further claims that the words "Winslow's Green Corn" do not, under the facts, indicate the origin or ownership of the products, but simply that they are prepared by a process originated by Isaac Winslow, and known to the trade as the Winslow process; that this process was never effectually patented, and was not patentable, and hence any one could use it, and could use any apt words to indicate that his product was by that process. He argues that "Winslow's Green Corn" are apt words for that purpose, and that they indicate the process only. The complainants concede that the process originated with Isaac Winslow, and was never effectually patented, but they insist that the words "Winslow's Green Corn," under the facts, do in themselves, and by association, indicate that the articles upon which they are placed are produced from the plant of Winslow, or his successors in the business. Many authorities are cited by counsel on each side of this controversy.

The respondent further urges that the words "John Winslow Jones" constitute his name, and that the letters "J. W. J." are the initials of his name, and were intended to represent his name and initials, and that no one else can acquire the right to use them or to prevent his using them. The complainants insist that the respondent should not use the words "John Winslow Jones, Portland, Maine," since he no longer carries on this business in Portland, Maine, and they do carry it on there; that the use by the respondent of these words combined injures their business, in that it tends to mislead the public into believing that the respondent's goods are the product of the old, well-known factories. The complainants further reply that, whatever other use the respondent may make of the letters "J. W. J.," for him to use them on the figure of a globe has the same injurious effect.

The complainants, however, do not rest their case on the ground that they have appropriated and used these words and symbols on the red and yellow labels, and that such words and symbols are capable of exclusive appropriation. They place their case on the ground that whatever the character of these words and symbols, they were devised and used by the respondent as the labels and trade-marks of his business, and as such were sold by him, for a valuable consideration, to the purchasers of his plant and business. The complainants, representing these purchasers, urge, and the facts show, that the respondent, by selling the good-will of the business, and the labels and marks used by him to designate the products of the business, promised, for a consideration, not to use such labels or marks for himself, and, for the same consideration, promised that the purchasers should have the exclusive use, so far as he was concerned. It is argued that whatever may be the rights of the complainants against third parties unaffected by any contract, they have acquired, by valid contract, from this respondent, the right to the exclusive use, as against him, of these labels, and the words and symbols upon them; and that his use of them, or of any colorable imitation of them, is a violation of his contract, which an equity court can and should prevent.

What is known as the good-will of the business is recognized by the law as a proper subject of sale or contract in connection with a transfer of a business plant. An established business, with plants and products well known to the trade, has a money value, often far above that of its mere plant, and this is often the controlling motive for the purchase. Labels, trade-marks, particular words and phrases devised or used to distinguish or identify the products of the plant, and associated with such products in the public mind, are in like manner usually transferred with the plant, and are regarded as valuable acquisitions for the purchasers. They are, equally with the good-will, proper subjects of such sale and contract. The name or initials of the originator or owner of the business, when used on labels and as trade-marks in the business, may thereby have a value, and so may be included in a sale of the business, so far at least as to prevent the vendor afterward using them in like manner on other similar products, to the detriment of his vendee.

These propositions are supported and illustrated by authorities. In *Kidd v. Johnson*, 100 U. S. 617, S. N. Pike adopted as

a trade-mark for his whisky the words "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio," inclosed in a circle. He took several partners into the business, but retained his individual ownership of the plant and the trade-mark. The firm, Pike being a member, removed the business to New York, and Pike sold the Cincinnati plant and trade-marks to Mills, Johnson, & Co., who entered upon the business with that plant, and used the same label and trade-mark before used by S. N. Pike and the various firms with which he was associated. Pike dying, his surviving partners undertook to use the trade-mark above described. The court held that the purchasers from S. N. Pike had the exclusive right to use the trade-mark, and enjoined the defendant's use. In *Burton v. Stratton*, 12 Fed. Rep. 696 (Mich.), two brothers, Stratton, originated a yeast, and adopted as a trade-mark the figures of two heads (portraits of one of them, with a twin brother) in an oval setting, with the words "Twin Brothers Improved Dry Hop Yeast." The brothers, the proprietors, sold the business and the trade-mark to Burton, who carried on the same business and used the same trade-marks. Subsequently one of the Strattons began making yeast, and used the words, or name, "Twin Brothers Dry Hop Yeast." The use of this trade-mark by Stratton was enjoined. Brown, J., said that the cases were numerous in which it had been held that a party may lawfully sell, not only a trade-mark indicative of origin in himself, but even the right to use his own name, in connection with a particular business. In *Pepper v. Labrot*, 8 Fed. Rep. 29 (Ky.), the right to use the words "Old Oscar Pepper" was held to pass by an assignment of the plant and business, even as against Pepper himself, the former proprietor, who had set up a separate establishment in another county. In *Skinner v. Oakes*, 10 Mo. App. 45, Oakes had originated a business of making and selling a candy called Oakes Candy. He took a partner, Probasco, and the firm carried on the same business. He afterward sold to Probasco all his interest in the property, business, and trade-marks. Probasco's title passed to Skinner. It was held that Oakes should be restrained from using the name "Oakes Candy" in a new candy business set up by him. In *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, A. N. Hoxie had originated and carried on a business of making and selling soaps, and used for label and trade-mark the phrases "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice Soap." He took Pegram into

partnership, and afterward sold to him all the plant, business, and good-will. Pegram then formed a partnership with Chaney. It was held that Hoxie, having sold and been paid for the names and marks applied to the soap, could not use them in a new soap business. In *Churton v. Douglas*, John. 174, the complainant and respondent had carried on a manufacturing business under the firm name of John Douglas & Co. Douglas sold to Churton all his interests in the plant, business, and good-will, and afterward formed a new partnership with another person in the same kind of business, under the same firm name, John Douglas & Co. The new firm was restrained from using that name.

But the respondent contends that this case is not within the above principles, even if they are correctly stated. He contends that any transfer of good-will, labels, and trade-marks by him to the Limited company was conditional upon his being employed for ten years as managing director of that company in America, and that his discharge at the end of two years worked a forfeiture of the right to the exclusive use of the labels and trade-marks. No such condition of forfeiture was expressed in words in the instrument of conveyance, nor in the preliminary agreement of sale, and forfeitures are not favored in the judicial interpretation of writings. We think the agreement for hiring was an independent agreement, so far as the conveyance and transfer of the property, good-will, and trade-mark were concerned. As well, we think, might Jones claim a forfeiture of all the property conveyed as of this part of it. We do not think it was intended that the property or the business or its good-will should revert to Jones if for any reason he should be discharged from the employ of the Limited company before the expiration of the ten years.

The respondent again contends, and stoutly, that the complainants should not have the protection of the law and of this court for these labels, for the reason that they, or the persons managing the property and the business since he left the employ of the Limited company, have so used the labels and marks as to mislead the public into believing that the goods were manufactured or prepared by him. The facts do show that the Limited company, and after it, Mattocks, and the Winslow Packing company, used the red or yellow labels more or less without change up to 1885, when the latter company printed across the face of such of these labels as it did use the words "Winslow Packing Co., successor to." Such

use of the labels, without words indicating that Jones had personally left the business, and indicating a change of ownership, would evidently mislead the public as to the manufacturer of the goods, and hence should not receive protection from the court. It would wrong Jones, as well as the public: *Stachelberg v. Ponce*, 23 Fed. Rep. 430; 128 U. S. 686; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218. It is plain that while thus using the labels the parties complainant in interest could not maintain a bill for an injunction against their use by the respondent.

The facts further show, however, that before the filing of the bill the proprietors of the labels refrained from using them, or made such additions to those they did use as clearly to indicate that the ownership of the business had changed, and that the successors to Jones, instead of Jones himself, were producing the goods. At the time of filing of this bill, none of the complainants were offending in this respect, but all seem to have been dealing fairly with the public. Of course they cannot have any damages or accounting for things done by the respondent while they were themselves offending, but if they are now themselves doing equity, they may ask the court to require the respondent to do equity also. In *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, the decision adverse to the complainant was put on the ground that the misrepresentation had been and was being continued. We find no authority deciding that a prior improper and misleading use of labels, afterward corrected and made right, should bar a bill in equity brought for the protection of the corrected label. In this case we think the improper use was inadvertent; and now that such use has been corrected for several years, it seems to us inequitable that Jones should continue to make use of the labels and trade-marks (or colorable imitations of them) which he sold for a satisfactory consideration to the complainants' predecessors.

In coming to this conclusion upon this question, however, we bear in mind that the improper use complained of was not by the complainant trustees, nor their predecessors in the trust, nor by the debenture holders, but by Mattocks and the Winslow Packing Company, who were practically mortgagors in possession, while the trustees and debenture holders were mortgagees out of possession. These innocent debenture holders have taken possession since the filing of this bill, as will hereafter be stated, and are now asking for protection.

Perhaps, had the original complainants or those now prosecuting been guilty of the misconduct, the result might have been different. We do not say.

The respondent also raises a question of equity pleading, which we have maturely considered. Pending this suit the debenture holders have caused all the property held by the original complainants as trustees, including the labels, trade-marks, etc., to be sold by the trustees to enforce the trusts and realize on the assets. At such sale duly held, Messrs. Davis, Baxter, and Davis were the purchasers, and the trustees conveyed to them all the property and rights held by them under the various trust deeds. These purchasers thereupon applied to the court for leave to come in as parties complainant, and further prosecute the suit. Leave was granted, and they were admitted as intervening complainants, to which order the respondent excepted. We do not see any objection to the admission of these new parties. Equity procedure is sufficiently elastic to admit new parties as their interests accrue. The purpose of their admission in this case is not to obtain a declaration of future rights, as argued by the respondent, but to obtain a declaration of present rights, and the prevention of future wrongs. The respondent is not prejudiced. The burden of the defense is not increased. The issues are not changed. The subject-matter remains the same, and the judgment must be the same, it being apparent that no accounting can be had in either case.

Our conclusion is, that the intervening complainants are properly made parties, and that equity requires in their behalf that the respondent should be perpetually restrained by injunction, as set forth in the decree appealed from.

We think, however, it is the duty of the complainants to the respondent, as well as to the public, to refrain from using the labels in such manner and form as might lead the public to suppose that the goods packed by them were packed by the respondent. They should strike from their letter-heads, circulars, and labels any words indicating that the goods were prepared by John Winslow Jones, and if they use his name, should add such words as clearly indicate that the goods are not prepared by him, but by them as his successors. This duty should be declared and made imperative in the decree, or in the supplemental decree, modifying the former decree. As the respondent was compelled to appeal to obtain this modification of the decree, so as to prevent the improper,

misleading use of his name, — a modification we think he is entitled to, — we think he should recover the costs since the appeal, to be set off against the complainants' costs to the time of the appeal.

Decree affirmed, and case remanded for additional decree, in accordance with this opinion.

ASSIGNMENT OF TRADE-MARKS OF WHICH ASSIGNOR'S NAME IS A PART. — There is no doubt of the general assignability of trade-marks, or more accurately speaking, of the right to continue the use of a trade-mark in connection with the sale or manufacture of goods by the successors in business of the assignor. The assignment may be involuntary as well as voluntary. A trade-mark is property, and, as such, subject to transfer in connection with the business in which it has been used, and liable, with other property, to respond to the payment of its owner's debts. Hence, if he makes an assignment for the benefit of his creditors, or such assignment is made for him in proceedings in insolvency or bankruptcy by some competent officer, the right to the trade-mark passes to the assignee: *Warren v. Warren Thread Co.*, 134 Mass. 247; *Motley v. Downman*, 3 Mylne & C. 1; *Hudson v. Osborne*, 39 L. J. Ch., N. S., 79. To this rule there is an exception of trade-marks personal in their character, the right to the exclusive use of which would carry with it the right to control, or at least restrict, the insolvent in his subsequent efforts to earn a livelihood. If a man becomes insolvent, and a general assignment is made by himself or by the law for him for the benefit of his creditors, it can only pass that property which he then possesses, or to which he is then entitled, leaving him free to afterwards acquire property in any lawful manner. This acquisition would be very seriously impaired if he were not permitted to use his own name in any enterprise in which he should see proper to engage. Therefore, if he used his name as a part of his trade-mark before he became insolvent, the assignment in insolvency or bankruptcy does not deprive him of the right to again use it in any business in which he may embark, though such business is of the same character and conducted in the same neighborhood as that in which he was before employed: *Helmhold v. Helmhold Mfg. Co.*, 53 How. Pr. 453; 17 Am. Law Reg., N. S., 169; *Mastingly v. Stone* (Ky. Nov. 1889).

A voluntary assignment of a trade-mark may probably be effected without especially mentioning it, as where a business is sold and the good-will thereof assigned: *Brown on Trade-marks*, secs. 57, 362; *Shipwright v. Clements*, 19 Week. Rep. 599; *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44. One who sells a business and the good-will thereof is not necessarily debarred thereby from entering on a like business, even in the same town or neighborhood, though he may probably be restrained from soliciting business from his old customers, and certainly will not be permitted to do anything to produce the impression that his new business is the same as that with the good-will of which he has already parted: *Bergamini v. Bastian*, 35 La. Ann. 60; 48 Am. Rep. 216; *Labouchere v. Dawson*, L. R. 13 Eq. 322; 25 L. T., N. S., 894; *Mogford v. Courtenay*, 45 L. T., N. S., 303; 29 Week. Rep. 864; *Leggot v. Barrett*, L. R. 15 Ch. D. 306; 51 L. J. 90; 43 L. T., N. S., 641; 28 Week. Rep. 968; *Ginesi v. Cooper*, L. R. 14 Ch. D. 596; L. J. 49 Ch. D. 601; 42 L. T., N. S., 751; *Pearson v. Pearson*, L. R. 27 Ch. D. 145; 54 L. J. Ch. D. 32; 51 L. T., N. S., 311; 31 Week. Rep. 1006.

The object of this brief note is not to consider the general question of the assignment of trade-marks, but rather the effect of the assignment of a trade-mark when it consists partly or wholly of the name of the assignor. There are two conflicting principles bearing upon this question, and it may often be difficult to determine which should be permitted to control. The first of these principles is, that the sale of a trade-mark, even though it contains the name of some individual, is undoubtedly valid in some circumstances, and the second, that the transfer or use of a trade-mark must not be permitted to operate as a fraud upon the public. The use of a man's name upon goods which he does not manufacture nor sell, and with which he really has nothing whatever to do, is well calculated to induce their purchase by persons who are seeking goods of his manufacture, or which he is willing to indorse by selling them as his, and if the trade-mark does not produce this effect, it can be of little value to the assignee.

Numerous cases affirm that a man may part with his right to use his own name as part of a trade-mark, and that thereafter the courts of equity may not prevent his assignee from using such name, but will compel the assignor to observe his assignment and the covenants therein contained, by which he binds himself not to use his own name in connection with any business of the same character as that which he has transferred: *Oakes v. Tonemierre*, 4 Woods, 547; *Kidd v. Johnson*, 100 U. S. 617; *Ainsworth v. Walmesley*, 35 L. J. Eq. 325; *Hall v. Barrows*, 10 Jur., N. S., 55; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; 35 L. J. Ch. 53; 13 Week. Rep. 873; 12 L. T., N. S., 742; 6 N. R. 209; 4 De Gex, J. & S. 137. Thus in *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149, where one A. N. Hoxie brought a bill in equity against Chaney and Pegram to restrain them from the use of the name and words "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice Soap, manufactured by A. N. Hoxie, agent," the court determined that complainant was not entitled to relief, because he had parted with the right to use these words as a trade-mark, by a bill of sale executed by him before the commencement of the suit. In another suit, in which Hoxie was the defendant, the same court determined to restrain him from using in his business the trade-marks which he had so previously sold. In *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, 2 Am. St. Rep. 73, Samuel Frazer was enjoined from using the words "Frazer," "Samuel Frazer," "S. Frazer," or "Samuel Frazer and Company," or the name of "Frazer" in any way, in the manufacture of axle-grease according to the process and ingredients used in the manufacture of Frazer's axle-grease, or axle-grease of any kind whatsoever." In *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685, it was determined that an injunction ought to issue against William M. Le Page for using as his trade-mark the words "Le Page's Liquid Glue," or "Le Page's Improved Liquid Glue," and from carrying on business under the name of "Le Page Liquid Glue Company"; and in *Skinner v. Oakes*, 10 Mo. App. 45, it was decided that the defendant, Oakes, should be restrained from using his name as an affix or trade-mark to certain candy, because he had transferred to the complainant the exclusive right to manufacture and sell "Oakes Candies."

In each of these cases, however, the court was of the opinion that the use of the individual name as part of the trade-mark in question was not intended to signify, and was not by the public understood to signify, that the articles with which such trade-mark was connected were manufactured or sold by or under the especial supervision of the person whose name was thus used, but rather that the name was understood as used in the trade-mark to indicate

that the articles were of a particular quality, or were manufactured according to a particular formula with which the name had become identified.

Whether the operation of a trade-mark of which the name of an individual is a part is to indicate that the person whose name is thus used gives his personal skill and integrity to the business, and that the article on which it is used may be reasonably believed to be such a one as with his skill and integrity he will be willing to have bear the guaranty of his name, is in many instances a question of fact, the decision of which may be diverse in different courts. If the court to which an assignee of a trade-mark of which the name of another individual is a part appeals for protection against the use of the same name by the assignor, or by any other person, is of the opinion that the use of the trade-mark by the assignee is to deceive or defraud the public, by inducing them to purchase goods in the mistaken belief that they are manufactured or sold by him whose name appears on the trade-mark, such court, proceeding on the principle that he who comes into equity must come with clean hands, will deny relief: *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Hozie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149; *Burry v. Bedford*, 4 De Gex, J. & S. 352; 33 L. J. Ch. 465; 10 L. T., N. S., 470; 12 Week. Rep. 726; *Massam v. Thorley's Cattle Food Co.*, L. R. 14 Ch. D. 748; 42 L. T., N. S., 851; 28 Week. Rep. 966.

The tendency of the more recent adjudication upon this subject is to destroy the assignability of trade-marks as far as relates to the personality of the assignor, or of any other person whose name appears to be a part thereof. The utmost effect which can properly be given to an assignment of a trade-mark is, that the assignee may by its use indicate and be understood to represent that he is the person who has succeeded to the business formerly carried on under such trade-mark, and is carrying on the same business, and has a right to use the trade-mark in connection therewith, and that he is using it upon goods of the same class, or manufactured or compounded in the same manner or by the same formula, and of materials of as good quality, as those in connection with which it was used by the originator thereof. If a trade-mark is such as to indicate that the article upon which it is used was manufactured by or under the personal supervision of one whose name appears on such trade-mark, but who has in fact parted with his interest in the business and the trade-mark, this misrepresentation must be counteracted by some statement accompanying or made a part of the trade-mark, and showing that it is being used by the successor in business of the originator of the trade-mark, and whose name appears as part thereof: *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137; 11 H. L. Cas. 523; *Pedding v. How*, 8 Sim. 477; and the principal case. The rule upon this subject, with the reasoning by which it is sustained, is well stated by Mr. Justice Field in the case already cited from 108 U. S. 218, in the following language: "Any one has an unquestionable right to affix to articles manufactured by him a mark or device not previously appropriated, to distinguish them from articles of the same general character manufactured or sold by others. He may thus notify the public of the origin of the article, and secure to himself the benefits of any particular excellence it may possess from the manner or materials of its manufacture. His trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded, not only as a matter of justice to him, but to prevent imposition upon the pub-

Ho: *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 54. The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public, and the very fraud accomplished to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of the purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person, in a different place, is a fraud upon the public which no court of equity will countenance."

DOE v. ROE.

[82 MAINE, 508.]

A WIFE WHOSE HUSBAND IS DEBAUCHED AND CRIMINALLY KNOWN BY ANOTHER WOMAN cannot maintain an action against the latter to recover damages therefor.

James A. Edgerly, for the plaintiff.

W. L. Putnam and W. S. Pierce, for the defendant.

WALTON, J. This is an action by a married woman against another woman. The plaintiff has alleged in her declaration that the defendant debauched and carnally knew her husband, thereby alienating his affection and depriving her of his comfort, society, and support.

The question is, whether such an action is maintainable. For such a wrong the law does not leave the injured wife without redress. She may obtain a divorce and a restoration of all her property, real and personal, and in addition thereto, alimony or an allowance out of her husband's estate. And the law will punish the guilty parties criminally. But does the law, in addition to these remedies, secure to her a right of action to recover a pecuniary compensation from her husband's paramour? We think not. We have been referred to no reliable authority for the existence of such a right, and we can find none.

It is true that a husband may maintain an action for the seduction of his wife. But such an action has grounds on

which to rest that cannot be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child. And what is still worse, it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences upon his wife. If she remains virtuous, no suspicion can attach to the legitimacy of her children. And an action in favor of the husband for the seduction of his wife has been regarded as of doubtful expediency. It has been abolished in England: Bouv. Law Dict., tit. Crim. Con. And the trials we have had in this country of such actions are not very encouraging. They seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured. And we fear such would be the result if such actions were maintainable by wives. Such a power would furnish them with the means of inflicting untold misery upon others, with little hope of redress for themselves. At any rate, we are satisfied that the law never has, and does not now, secure to wives such a power, and if it is deemed wise that they should have it, the legislature, and not the court, must give it to them.

Exceptions overruled. Demurrer sustained. Declaration adjudged bad.

WIFE'S RIGHT OF ACTION TO RECOVER DAMAGES for the enticement of her husband: See note to *Shaddock v. Clifton*, 94 Am. Dec. 593, 594; note to *Westlake v. Westlake*, 32 Am. Rep. 406-408.

In New York and Illinois it has been decided that a wife may maintain an action against another for enticing her husband from her: *Breiman v. Pasack*, 7 Abb. N. C. 249; *Bassett v. Bassett*, 20 Ill. App. 543.

CAREY v. MACKEY.

[82 MAINE, 616.]

BOND, WHAT IS. — AN AGREEMENT TO DO A THING, ACCOMPANIED BY THE STIPULATION "and this I bind myself to do, under penalty of five thousand dollars," is a penal bond.

PENALTY WHEN NOT LIQUIDATED DAMAGES. — An agreement for the separation of a husband and wife, and that he will pay a specified amount to her monthly, and binding himself to make such payment under a penalty of five thousand dollars, which sum shall be considered a forfeiture to her, may be declared upon as a penal bond, and the five thousand dollars are a penalty, and not liquidated damages.

HUSBAND AND WIFE — AGREEMENT FOR SEPARATION. — A bond for the payment by a husband, of a monthly allowance to his wife, in view of their separation, is valid.

CONFLICT OF LAWS. — If a contract is valid by the laws of one state, and invalid by those of another, the parties are presumed to incorporate in the contract the law which would make it operative.

CONFLICT OF LAWS. — If a husband and wife, residents of Florida, temporarily residing in Maine, enter into a contract in the latter state, for their separation, and that he will pay her a monthly allowance for her support, such contract will be enforced in Maine, though not valid under the laws of Florida.

HUSBAND AND WIFE—DIVORCE. — AGREEMENT FOR SEPARATION OF HUSBAND AND WIFE, and that he will pay her a monthly allowance for her support, is not abrogated by their subsequent divorce.

G. C. Yeaton and H. H. Burbank, for the plaintiff.

R. P. Tapley and H. Fairfield, for the defendant.

PETERS, C. J. The plaintiff declares on the instrument introduced below, as a penal bond, and also upon the covenants expressed in it: —

“This agreement, made this twelfth day of September, 1882, between Jonathan I. Mackey and Alicia C. Mackey, both of Florida, and residents of Jacksonville, in said Florida, witnesseth, that whereas my wife, Alicia C. Mackey, has this day expressed her desire to me that a separation of relations of man and wife between ourselves might be effected, and for good reasons known to herself, be it known that I hereby consent to said separation, and in consideration of my duty to her as her husband, I hereby agree to pay to her monthly, through the Hon. M. A. McLain, of Jacksonville, aforesaid, the sum of thirty dollars per month, on the first day of each month, the first installment or payment being and to become due November 1, 1882. And I hereby bind myself to the well and true payment of thirty dollars, aforesaid, monthly, so long as she shall maintain good behavior and shall (not) have remarried, and this I bind myself to do under a penalty of five thousand dollars, to be recovered by her in any court of law by attachment upon my property and of myself, which sum of five thousand dollars aforesaid I hereby agree shall be considered a forfeiture upon my part to her. And this thirty dollars per month is in addition to the one hundred and fifty dollars which I have already paid her, at the making of this agreement. And this I do freely and understandingly.

“Witness my hand and seal this 12th September, 1882.

“J. I. MACKEY.” [Seal.]

The instrument was acknowledged before H. M. Sylvester, a notary public, and witnessed by him.

The plaintiff cannot recover on both forms of declaration. She elects to recover the penal sum. We have no doubt the instrument declared on is a penal bond. It contains all the elements of one, though perhaps not expertly put together.

"If I, by deed, covenant or promise to do a thing, and then say, to perform which promise I bind myself in twenty pounds, this is a good obligation in law." No set form of words is necessary, as see numerous illustrations in Bacon's and Dane's Abridgments, title Obligation. We are of opinion that the five thousand dollars are a penalty, and not liquidated damages.

Passing the points made on the pleadings, an important question arises whether an agreement for separate support is valid in this state. We do not see why not. It is said in argument that there has never been a judicial decision in the state touching the question. That indicates that the danger of a frequency of such cases must be small indeed.

Certainly, such an agreement comes within the spirit of our late statute which provided for a divorce from bed and board, the marital tie remaining. There never has been any judicial expression in this state against an agreement for separate support. The doctrine is upheld in an early Massachusetts case when this state was a part of that commonwealth, and the precedent is therefore as binding here as it is there.

In *Page v. Trufant*, 2 Mass. 159, 8 Am. Dec. 41, decided in 1806, it was held that "a bond from the husband to the father of the wife, for her maintenance, after a voluntary separation, is a valid contract." According to the practice of that day, each judge sitting expressed his opinion on the question, and all favored the doctrine. Parsons, C. J., closed the discussion in these words: "It in fact appears on the record that the consideration was legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them."

In *Fox v. Davis*, 113 Mass. 255, 18 Am. Rep. 476, the doctrine is fully recognized, and was applied in that case. Mr. Bishop (1 Bishop on Marriage and Divorce, 8th ed., b. 5, c. 39) enumerates the states, citing their cases, where the doctrine is either allowed or disallowed; and it appears to have been accepted by most of the states. In England it is established by act of Parliament. The condition on which it rests is, that separation has already taken place, or that the agree-

ment is made in contemplation of an immediate separation, which takes place as contemplated.

The only objection to such contracts is the encouragement which may be afforded for married parties to separate from each other. We think that amounts to little or nothing under our liberal divorce system. Parties greatly prefer divorce and alimony to mere separation.

There may be a distinction to be observed. Some contracts of separation might offend public policy, and others not. Certainly, there are cases where a wife would be justified in separating from her husband, and asking a support from him notwithstanding the separation. There was undoubtedly good cause for separation in the present case. The evidence in the divorce case, to be alluded to hereinafter, which is a part of the record of this case, shows that the separation was caused by cruelties inflicted by him upon her. He had frequently choked her severely, and habitually abused her in different ways. She proves that she has been a person of good behavior since separation, as the contract requires of her, and that she has not married again.

It is contended, however, by the defendant that the contract is to be interpreted, not by the law of Maine, but by the law of Florida, where, by its terms, it was to be performed, and that such a contract is invalid by the law of the latter state.

While it may be admitted that the general rule is, that contracts are to be interpreted according to the law of the place where performance is to be had, there are some exceptions when the question pertains to the validity of the contract, rather than to the meaning of its provisions. We are satisfied that the general rule invoked by the defendant's counsel does not govern the case before us. That rule is more applicable to commercial contracts than to agreements like this.

Professor Wharton lays down and supports with authorities this proposition: "That parties who enter into a contract are presumed to do so *bona fide*, intending the contract to be performed; and that they are supposed, if two systems of law are before them, by one of which the contract would be good, by the other of which it would be bad, to incorporate in the contract the law which would make the contract operative": Wharton on Evidence, 2d ed., sec. 1250. The same author states the same proposition again (Wharton's Conflict of Laws, 2d ed., sec. 429), in these words: "It is always to be presumed that persons agree effectually to do that which

they contract, and if so, this agreement becomes a part of the contract, overriding such local law as does not rest on a ground distinctively moral or political. And when there is a conflict of possible applicatory laws, the parties are presumed to have made part of their agreement that law which is most favorable to its performance."

Professor Parsons (2 Parsons on Contracts, 6th ed., 583) accepts and strongly advocates this view. There are also late cases supporting it. In *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635, it is held that when a vender sold goods in Rhode Island to be delivered in New York, and the contract was valid in Rhode Island, and void in New York on account of the statute of frauds in that state, the sale should be regarded as a Rhode Island contract. A note made in Connecticut on Sunday after sunset was held to be valid, though had it been made in the same circumstances in Rhode Island it would have been invalid. *Brown v. Browning*, 15 R. I. 422, 2 Am. St. Rep. 908, *Blackwell v. Webster*, 23 Blatch. 537, and *Scudder v. Union Nat. Bank*, 91 U. S. 406, bear with weight on this question.

There are strong circumstances, features in the contract, and facts about it, which strengthen the presumption that the parties intended to be governed by the laws of Maine in their contract. The paper was made here (at Portland) and delivered here. It was partly performed here, one hundred and fifty dollars having been paid at its delivery. The cause producing the agreement occurred in Maine, being principally his treatment of her while temporarily residing at Old Orchard. The separation took place in Maine, and there was nothing preventing her thereafterwards residing in Maine, or out of Florida.

The parties were not at the time merely traveling through the state, but were temporarily abiding here. No evasion of the law of Florida was intended, nor is the contract a criminal one under her laws. It is merely contended that that state has adopted a part of the old common law, which disapproves such agreements upon grounds of public policy.

That state has no statute on the subject, and no case touching it has ever been in any form before any of its courts.

We think the contract is legally enforceable in this state.

It is contended for the defendant that the agreement for separate support was terminated by the divorce obtained by the plaintiff in a court in Florida in 1883. The agreement

does not provide for its rescission or termination upon the wife's divorce. A failure of good behavior, or remarriage, are the only causes provided for its termination. The promised support would be just as much needed after divorce as before. There is no agreement of parties in the provisions of the divorce, nor was there any in the negotiations preceding divorce, that the contract should be annulled thereby, although the defendant attempted to prove such an understanding. The court could have imposed such condition, a not uncommon thing, but failed to do so. Nor does the decree of divorce, of its own force, have the effect of terminating the prior agreement for separate support. On this point the doctrine is stated by Mr. Bishop, and the authorities fully cited: 1 Bishop on Marriage and Divorce, 6th ed., sec. 637; 2 Id., secs. 55, 717-722, 741.

The counsel for the defendant argue at great length that an action cannot be maintained on the agreement, because not of legal form in all respects, very properly contending that all contracts made between husband and wife do not become valid merely because the marital tie has been sundered by a decree of divorce. But all contracts of the kind which equity would uphold before divorce the law recognizes after divorce.

This agreement is substantially a legal agreement, and at all events a good equitable agreement. Had the promise in it been made to the plaintiff's agent as her trustee, it would have been a perfectly formal instrument at law. But the promise is to her, though the delivery of the money was to be to the agent for her. Equity would have readily supplied formality.

In the divorce proceedings the plaintiff received allowances towards her support of \$690, the terms of divorce having been arranged by the counsel of the parties. Here, then, was a decree of court for support, and also an agreement of parties for the same purpose. It does not clearly appear what was in the minds of the parties about a double allowance, but from what was said and done in the negotiation, and because there would be much apparent justice in thus interpreting the transaction, we think we are justified in concluding that it was the tacit understanding of the parties that the allowances in the divorce suit should be a credit to that extent upon the amounts payable by the contract: *Albee v. Wyman*, 10 Gray, 222.

The result must be that judgment is to be entered for the

penal sum of the bond, execution to issue for the sum due on the bond, less the credit of \$690.

Defendant defaulted for the penal sum. Damages to be assessed at *nisi prius*.

PENALTIES. — For the distinction between penalties and liquidated damages, see *Moore v. Colt*, 127 Pa. St. 289; 14 Am. St. Rep. 845, and note.

AGREEMENT FOR SEPARATION BETWEEN HUSBAND AND WIFE. — The divorce of a husband and wife, after their valid agreement for a separation, or the commission by either of them of an act entitling the other to a divorce, does not avoid or annul such agreement, or entitle either to be released therefrom: *Gahaka v. Gahaka*, 116 N. Y. 636; 15 Am. St. Rep. 453, and note.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

**AGRICULTURAL AND MECHANICAL ASSOCIATION OF
WASHINGTON COUNTY v. STATE, USE OF CARTY.**

[71 MARYLAND, 86.]

JURY TRIAL — MULTIPLICATION OF PRAYERS SUBSTANTIALLY THE SAME, on subjects upon which the law has been thoroughly well settled, is a practice much to be deprecated.

JURY IS CONFINED TO PROXIMATE DAMAGES SUSTAINED BY PARENT, in estimating the damages, in an action brought by him to recover for the death of his child, caused by the negligence of the defendant.

EXPECTATION OF PROXIMATE BENEFIT TO PARENT FROM CONTINUANCE OF CHILD'S LIFE BEYOND MINORITY cannot be taken into account by the jury in an action by a parent, brought under the negligence act of Maryland, to recover damages for the death of his minor child, although the child had been emancipated by his father two years before he was killed, had voluntarily given to his father each year after his emancipation a portion of his wages, and "had said that after he had got of age he would help to fix up the property."

ACTION to recover damages for the death of a minor, alleged to have been caused by the negligence of the defendant. The opinion states the case.

Alexander Neill, Frederick F. McComas, and Edward Stake,
for the appellant.

J. Clarence Lane and Henry H. Keedy, for the appellee.

MILLER, J. This suit was brought under the negligence law by a father to recover damages for the death of his minor son, caused, as it is alleged, by the negligence of the defendant. Many actions have been brought under this statute, and they seem to be daily increasing in number. The legal

principles which govern them are familiar, but there is always more or less difficulty in the application of these principles to particular cases. Here the boy killed was nineteen years and seven months old, and he met his death under peculiar circumstances.

We gather, from the record, that in October, 1888, the defendant held a fair in its grounds at Hagerstown. Among the exhibitions offered for the amusement of visitors were balloon ascensions and trapeze performances in the air. The preparations for these were in a circular inclosure in a part of the fair-grounds, and several large poles were planted, by which the balloons could be stayed and held while they were in process of inflation and made ready to be sent up. One of these poles, which it is alleged was insecurely fixed in the ground, fell upon the boy, and killed him. He had a ticket as keeper of stock, which admitted him to the fair-grounds free of charge, but with all the privileges of an ordinary visitor.

There was the usual conflict of testimony as to negligence on the part of the defendant, and as to contributory negligence on the part of the deceased. But on this part of the case little need be said. We find no error warranting a reversal in the instructions on these subjects given to the jury by the learned judge before whom the case was tried in granting the plaintiff's third and fifth prayers, and the defendant's third, fourth, eighth, ninth, and tenth prayers. The defendant's fifth, sixth, and seventh prayers on the same subject were properly rejected, because those granted fully covered the law as to this branch of the case. The multiplication of prayers substantially the same on subjects about which the law has been thoroughly well settled is a practice much to be deprecated.

But the question most earnestly argued arises upon the rulings as to the measure of damages. The judge was clearly right in instructing the jury that in estimating the damages they were confined to the pecuniary damages sustained by the plaintiff. The authorities all agree that in suits under Lord Campbell's act, and similar statutes in this country, pecuniary damages only can be recovered. Nothing can be given the father as a *solatium* for the bereavement suffered by the loss of his child. The statute does not deal with the priceless value at which a father holds the life of his child, and only professes to compensate him for the pecuniary loss he may

sustain by his death. But the court told the jury that in estimating such damages they could allow the father what they may believe, from all the evidence in the case, will be an adequate compensation "for the loss of his son's life," and refused to instruct them that they could only give such as they may believe, from the evidence, will be an adequate compensation for the loss of his son's services "until he should arrive at the age of twenty-one years." So the question is fairly raised whether, in a suit by a father under this statute to recover damages for the death of a minor child, the jury should be allowed to take into account any expectation of pecuniary benefit to the plaintiff from the continuance of the child's life beyond minority.

There is conflict of authority on this subject in other states: *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 330; *Caldwell v. Brown*, 53 Pa. St. 453; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504. But so far as this state is concerned, we think the question has been settled. It first arose in the case of *State v. Baltimore etc. R. R. Co.*, 24 Md. 84, 87 Am. Dec. 600, which was decided in 1865, and is among the first, if not the first case, in which this statute was construed, it having been passed in 1852. In that case, the boy killed was between ten and twelve years of age. He had no father living, and the suit was brought by his widowed mother, who had a large family, and kept a small grocery store. He was his eldest child, a smart, likely lad, who attended the store when his mother was absent, and his services were worth to her from five to six dollars per month at time the accident occurred.

The court below (Martin, J.) instructed the jury, on the question of damages, that they could only give the mother such sum as they "may believe, from all the evidence in the case, will be an adequate compensation for the loss of her son's services from the time of his death to the period when, if he had lived, he would have attained the age of twenty-one years." This instruction was vigorously assailed by able counsel, in argument, but this court affirmed it, and said: "To submit to a jury the value of a life, without limit as to years, would have been to leave them to speculate upon its duration without any basis of calculation. The law entitles the mother to the services of her child during minority only; beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. According to the

appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate; but the law has no standard by which to measure their loss." It has been suggested that by alluding to the fact that the mother was entitled by law to the services of her child during minority only, the court intended to say that all actions under this statute must be founded on legal liability alone. But we do not so understand the court's judgment. What the court was enforcing and deciding was, that juries ought not to be allowed in such cases to assess damages upon vague conjecture or speculation. The danger of verdicts founded on mere guess-work is alluded to in a previous part of the opinion, where it is said that "generally speaking, the influence of the court in this class of cases should be exerted to restrain those excesses into which juries are apt to run." The legal right of the mother to the services of her minor son is referred to as furnishing a safe basis from which the jury may reasonably infer that she suffered a pecuniary loss by his death, and as affording her a reasonable expectation of pecuniary benefit from the continuance of his life during minority. But what a minor child may be able or willing to do for his father or mother after he becomes of age, when he has the right to leave the parental roof and set up for himself in life, and before his willingness and ability have been tested by experience, is, as we understand the court to say, a matter of conjecture, too vague to enter into an estimate of damages in such a case.

Such is the meaning and effect of this decision. It is a leading one in our state, and has been repeatedly followed. In *Cumberland etc. R. R. Co. v. State*, 44 Md. 283, the boy killed was old enough to be a fireman on a locomotive-engine, and an instruction containing the same restriction met the approval of this court. In *Baltimore etc. R. R. Co. v. State*, 54 Md. 648, the boy was twelve years old, and a like instruction was granted. So in *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, where a minor son sued for the death of his father, his right to prospective damages was limited to his attaining his majority. In fact, *State v. Baltimore etc. R. R. Co.*, 24 Md. 84, 87 Am. Dec. 600, has in this state been universally recognized as having settled the law on this subject.

Nor has it been overruled or shaken by anything said or

decided in *Baltimore etc. R. R. Co. v. State*, 60 Md. 449. On the contrary, it is there cited with approval, and carefully distinguished from the case then under consideration. Our statute, unlike those of some of the states which give the action for the benefit of the next of kin generally, closely follows Lord Campbell's act, and allows suits only for the benefit "of the wife, husband, parent, and child" of the person killed. And in *Baltimore etc. R. R. Co. v. State*, 60 Md. 449, the court, following the English decisions construing their statute, decided that "legal liability alone is not the test of the injury in respect of which damages may be recovered under the statute; but that the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account by the jury, and damages given in respect of that expectation if it be disappointed, and the probable pecuniary loss thereby sustained." In that case, a father was killed who had two adult unmarried daughters who lived with him as part of his family, were dependent upon him for support, by reason of their inability to support themselves, and the father had supported, and was supporting them at the time of his death. In view of these facts, the court considered it a case falling within the rule of interpretation above stated, and allowed the jury to award damages to these adult as well as to the minor children.

Following in the same line is the case of *Baltimore etc. R. R. Co. v. State*, 63 Md. 135. The person killed was a mother who had made her permanent home with a married daughter, to whom she rendered services by attending to housework and looking after the children while the daughter was away at work, and thus gave her considerable assistance, which she had rendered, and was rendering when she was killed. The court allowed the jury to consider the pecuniary value of these services to the daughter, and to award her damages for the loss of them. In each of the English decisions cited in both these cases, the adult son who was killed had given and was giving assistance of a definite pecuniary amount to his parents, and this fact was relied on by the court as the evidence which showed that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life: *Dalton v. South-Eastern R'y Co.*, 93 Eng. Com. L. 296; *Franklin v. South-Eastern R'y Co.*, 3 Hurl. & N. 211. Of like character and to the same effect is *Pennsylvania R. R. Co. v.*

Adams, 55 Pa. St. 499; and many other similar cases might be cited. In these cases, the son, after attaining age, had manifested his willingness to assist his parents by actually doing so, and when that fact is proved we can understand how the latter may reasonably expect further assistance if the son lives. But whether a minor son will do so after he comes of age is, as it seems to us, a matter of vague conjecture, which can furnish no reasonable foundation for a verdict.

In the present case, the father testified that he had emancipated his son two years before he was killed; that he was working for himself, and had voluntarily given each year to witness, since his emancipation, seventy-five or eighty dollars of his wages; that he was a farm-hand and earned from one hundred and ten to one hundred and twenty dollars a year, and was living with witness, except when at labor. But the only effect of this emancipation, as it is called, was to protect, so long as it continued, the employer, in paying his wages to the minor himself. The father could revoke the privilege at any time he chose, and collect and receive his entire wages.

Again, in answer to the direct question, "Did you have any reasonable expectation that he would do this [that is, give you seventy-five or eighty dollars a year] after he became of age?" the father testified that "the deceased had said that after he got of age he would help to fix up the property, and that he never said anything about getting married"; and the court, against the objection of the defendant, allowed this testimony to go to the jury. But a vague declaration or promise like this, made by a minor, has no probative force whatever, and in our opinion, this evidence is altogether too slight and insufficient to enable the jury to find from it a ground for the reasonable expectation which the law requires. Nor do we find any evidence in this record which can have the effect of taking this case out of the rule laid down by our predecessors in *State v. Baltimore etc. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600. That case was, in our judgment, well decided.

We have considered the case very carefully, and it follows from what we have said that while there is no error justifying a reversal in the other rulings of the court, there is error in the modification made by the court to the defendant's eleventh prayer, in rejecting its twelfth prayer, in granting the plaintiff's first and fourth prayers, and in the ruling relating to the admissibility of evidence contained in the second exception,

and for these errors the judgment must be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded.

PARENT AND CHILD. — As to the measure of damages recoverable by a father for the death of his child, see *Fordyce v. McCants*, 51 Ark. 509; 14 Am. St. Rep. 69, and note; *Cooper v. Lake Shore etc. Ry Co.*, 66 Mich. 261; 11 Am. St. Rep. 492.

WHITRIDGE v. WILLIAMS.

[71 MARYLAND, 106.]

CONSTRUCTION OF WILL. — Where a testator bequeaths to a trustee a sum of money to be held in trust, and the income to be paid to a married woman, "for the sole use of herself and her children during the term of her natural life, this trust to continue until her youngest child then alive attain to the age of twenty-one years, should she herself die previous to that time, when said trust fund is to go to her child or children then alive, in equal proportions," — 1. The words "for the sole use of herself and her children" did not give the children any estate in the property bequeathed. They showed that their support and maintenance were objects for which the testator desired to provide, but the mode which he adopted for securing this result was the gift to her of the income during her life. 2. The beneficiary having died before her youngest child attained the age of twenty-one years, the trust was to continue until it reached that age, and then the fund was to be divided equally among the children living at that time. 3. The income accruing after the death of the beneficiary was not to accumulate until the time of division, but the children were entitled to equal shares of such income until the time of division should arrive. 4. The beneficiary was entitled to the income during her life, and the trustee had no authority to use any portion of it to repair the depreciation of the principal. 5. The portion of such income which was converted by the trustee into principal belongs to the personal estate of the beneficiary, and must be delivered to her administrator. 6. But no loss ought to fall upon the trustee from his having so invested the income, since the beneficiary received the benefit of the investment during her life, and the delivery of the investment to her administrator will protect her personal estate from harm, and ought therefore to be credited to the trustee as income paid by him.

BILL in equity to obtain a construction of a clause of a will. Thomas Whitridge, now deceased, left the following legacy in his will: "I give and bequeath to John A. Whitridge fifty thousand dollars in cash, to be held in trust, the income of which to be paid to Mrs. Mary C. Williams, wife of Dr. Philip C. Williams, for the sole use of herself and her children during the term of her natural life; this trust to continue until her youngest child then alive attain to the age of twenty-one

years, should she herself die previous to that time, when said trust fund is to go to her child or children then alive, in equal proportions, but should she die without a child or children," then to certain persons named. In the residuary clause other property was left in the same way, to be included in the trust above mentioned. Mrs. Williams died, leaving four children, one of whom is over twenty-one years of age, and the other three are under that age. John A. Whitridge, trustee, averred in his bill that he had received the fifty thousand dollars above mentioned, and certain stocks and bonds; that during the lifetime of Mrs. Williams he paid over to her the net income, except the sum of \$2,037.37, the balance in his hands at the time of her death, and except, also, about three thousand dollars, which he found it necessary, in order to keep the principal unimpaired, to transfer to the principal account, from time to time, to make good the loss of premiums on certain securities, which had depreciated as they approached maturity. He also averred that he had received other sums of money belonging to the trust, all of which, except \$11,367.73, he had invested. The principal object of the bill was to obtain the opinion of the court as to the meaning of the above-mentioned clause in the will, and its direction as to the disposition of the income already collected, and that which should accrue during the future continuance of the trust. The children and the administrator of Mrs. Williams were made defendants. The circuit court decreed that the trustee should be charged with the income collected by him in the lifetime of Mrs. Williams, and be allowed credit for payments to her, and the expenses of executing the trust, and commissions, and that the balance then remaining should be paid to the administrator of Mrs. Williams, and that the income accrued since her death should be equally divided among her children. All the parties appealed.

Skipwith Wilmer, for the trustee.

Randolph Barton, for J. W. Williams, and for the guardian of the infants.

James M. Ambler, for the administrator.

BRYAN, J. It is necessary to say but little about the construction of the will. The income was to be paid to Mrs. Williams during the period of her natural life. The words "for the sole use of herself and her children" did not give the

children any estate in the property bequeathed. They showed that their support and maintenance were objects for which this testator desired to provide, but the mode which he adopted for securing this result was the gift to her of the income during her life. If she should die before her youngest child should reach the age of twenty-one years, the trust was to continue until it reached that age, and then the fund was to be divided equally among the children living at that time. The purpose of the testator to secure a support for the children during their minority is clearly evident; his purpose would be fully accomplished when the youngest child reached full age; and at that time he directed the principal to be divided. If the income were to be required to accumulate, instead of being divided among the children, a leading object of the testator would be defeated. We think that until the time of division shall arrive the children are entitled to equal shares of the income.

Mrs. Williams was entitled to the income during her life; and the trustee had no authority to use any portion of it to repair the depreciation of the principal. That portion which was so converted into principal belongs to the personal estate of Mrs. Williams, and must be delivered to her administrator. No loss, however, ought to fall upon the trustee from having so invested the income, as Mrs. Williams received the benefit of the investment during her life. The delivery to her administrator of the investment will protect her personal estate from harm, and it ought therefore now to be credited to the trustee as income paid by him. The costs in this court must be paid out of the trust fund.

Decree affirmed.

ONE APPOINTED TRUSTEE FOR A WIFE AND CHILDREN continues to be trustee for the children, where he has not renounced: *Salter v. Salter*, 80 Ga. 178; 12 Am. St. Rep. 249.

FRAZIER AND WIFE v. LANAHAN.

[71 MARYLAND, 181.]

APPLICATION OF PAYMENTS. — Where a person indebted to another on a mortgage or on a judgment, and also on an open account or on a note, makes a payment generally, and the creditor has made no appropriation of such payment, the law will apply it to the most burdensome debt, that is, to the mortgage or judgment, in preference to the note or open account. But where the debtor is indebted on a mortgage and on a judgment, both of which are liens on his property, the payment ought to be applied to the oldest lien due and enforceable at the time the payment is made.

WIFE'S UNITING WITH HUSBAND IN MORTGAGE CREATES NO EQUITY IN HER FAVOR as against the rights of a creditor in making application of payments. She stands in no better position than a surety, who has no right to control, for his benefit, an appropriation of payments, when such appropriation is to be made by the court. Nor is the question affected by the fact that some of the payments were made with proceeds of the sale of tobacco grown and wood cut on property belonging to the wife, where the tobacco was grown and the wood was cut by the husband with the consent of the wife, and the proceeds of the sale were used and applied by him with her consent, and without any knowledge on the part of the creditor as to the sources from which the money was derived.

BILL to foreclose a mortgage from Frazier and wife to Lanahan. The court passed a decree directing a sale of the mortgaged premises. Other facts are stated in the opinion.

Joseph S. Wilson, for the appellants.

John P. Briscoe, for the appellee.

ROBINSON, J. The appellant Frazier was indebted to Messrs. Lanahan and Son on a running account beginning in 1871, and continuing down to 1874. Among the items in this account was a note of \$1,640, the payment of which was secured by a mortgage, in which Frazier's wife united. Another item was a note of \$1,000, and on this note a judgment was entered against Frazier and wife. The entire indebtedness of Frazier to Lanahan and Son amounted to \$8,017.10. Upon this indebtedness, payments were made by Frazier at sundry times amounting to \$6,642.37, leaving a balance, as claimed by Lanahan and Son, of \$1,474.73. There does not seem to have been any specific appropriation of these payments, either by Frazier or by Lanahan and Son, and the question is, How shall these payments be applied by a court of equity? All agree that the payments made prior to the execution of the mortgage and the entry of the judgment on the note of \$1,000 are to be applied to the first items of the account; but the con-

tention is in regard to the payments subsequently made, amounting to about \$1,400—whether they shall be applied to the mortgage or to the judgment. Now, whatever may be the rule elsewhere, it is well settled in this state that where one is indebted to another on a mortgage or on a judgment, and on open account or note, and makes a payment generally, and there has been no appropriation of such payment by the creditor, the law will apply it to the most burdensome debt; that is to say, to the mortgage or judgment, in preference to the note or open account. Such was the rule of the civil law, and it has been the rule here ever since the decisions in *Gwinn v. Whitaker*, 1 Har. & J. 754; *Dorsey v. Gassaway*, 2 Har. & J. 412; 3 Am. Dec. 557.

In this case, the mortgage and judgment are both liens on the property of the debtor, the one a general and the other a specific lien, and the payments, it seems to us, ought to be applied therefore to the oldest lien due and enforceable at the time the payments were made. And if so, the payments were properly applied by the court in discharge of the judgment, because it was due prior, in point of time, to the mortgage.

The fact that the wife united with the husband in the mortgage cannot create an equity in her favor as against the rights of the creditor. She can stand in no better position than a surety, and a surety has no right to control for his benefit an appropriation of payments, when such appropriation is to be made by the court. On the contrary, we take the rule to be, where one has two demands on the same debtor, the one being a sole obligation and the other an obligation with a surety, and no appropriation has been made of payments by either the debtor or creditor, the law will apply the payments to the sole obligation, in preference to the secured debt: *Chester v. Wheelwright*, 15 Conn. 562; *Pierce v. Sweet*, 33 Pa. St. 151.

Some of the payments, it was said, were made with the proceeds of sale from tobacco grown and wood cut on property belonging to the wife. But this cannot affect the question. The tobacco was grown and the wood was cut by the husband with the consent of the wife, and the proceeds of sale were used and applied by him with her consent, and without any knowledge on the part of the appellees as to the sources from which the money was derived. No one can question the right of the husband, under such circumstances, to apply the proceeds as he saw fit; and if no appropriation was made by him,

then the appellees had the right, and if they failed to exercise this right, then the court will apply the payments thus made to the oldest lien due.

In dealing with this case, we have treated the mortgage as one to Lanahan and Son, for although it was taken in the name of Samuel J. Lanahan, a member of the firm, it is admitted that it was given to secure an indebtedness to Lanahan and Son; and this being so, a court of equity will treat it as a mortgage to the firm.

The payments, it seems to us, were properly applied by the court, and the decree will be affirmed.

Decree affirmed.

APPLICATION OF PAYMENTS — *Generally.* — One owing several debts to the same person, and making a payment, may apply it to whichever debt he pleases; but in the absence of an application by the debtor, the creditor may make such application of the payment as he desires: *Blair v. Carpenter*, 75 Mich. 167; *King v. Sutton*, 42 Kan. 600. After a controversy between a debtor and creditor, neither has the right to direct the application of payments: *Lamarus v. Freidheim*, 51 Ark. 371. And whenever payments have not been applied by the parties, the law will apply them according to the equity of the case, preferring a debt first due, undisputed, bearing the highest interest, and unsecured: *Magarity v. Shipman*, 82 Va. 806; *Duncan v. Thomas*, 81 Cal. 56; *Blair etc. Co. v. Hillis*, 76 Iowa, 246; and in the case of running accounts, the law will apply payments to the extinguishment of the items in the order of their dates: *First Nat. Bank v. Hollingsworth*, 78 Iowa, 575; *Lamarus v. Freidheim*, 51 Ark. 371; *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325.

In *Hanson v. Manley*, 72 Iowa, 48, where four notes were taken for the purchase price of a machine, and a mortgage was taken upon the machine to secure the notes, and a surety signed the two notes first to fall due, the machine having been sold under the mortgage for an amount more than sufficient to pay off the first two notes, the court decided that the surety could not insist that the proceeds of the mortgage sale should be applied upon the first two notes, but that the holders of the notes could apply the money upon the other notes, which were unsecured except by the mortgage.

In *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354, it was decided that when any moneys of a firm are paid with reference to the release of a mortgage held by a firm creditor, such purpose is a sufficient designation of the payment as to require the payment to be applied upon the secured debt.

The rule that a payment must be applied so as to do greatest benefit to the debtor cannot be invoked by a purchaser of mortgaged property in order to secure its release, where a subsequent partial payment is by consent applied by the mortgagee to other indebtedness: *Hiller v. Levy*, 66 Minn. 30.

SHUTT v. SHUTT.

[71 MARYLAND, 192.]

CRUELTY OF TREATMENT AS GROUND FOR DIVORCE A MENSA ET THORO. —

Outbreaks of passion and violence on the part of a wife when she is under the influence of drink and beyond self-control do not constitute such cruel treatment of the husband as will justify a divorce *a mensa et thoro*.

DRUNKENNESS DOES NOT CONSTITUTE SUCH EXCESSIVELY VICIOUS CONDUCT on the part of a wife as will justify a divorce *a mensa et thoro* under the Maryland code, although it may be accompanied with gross and revolting language, and lead to disagreeable broils in the family.

BILL for divorce. The opinion states the case.

Edgar H. Gans and Bradley T. Johnson, for the appellant.

Frank X. Ward and William A. Fisher, for the appellee.

ALVEY, C. J. The bill in this case was filed by a husband against his wife for a divorce. The prayer of the bill is for a decree *a vinculo matrimonii*; but there is no ground shown for any such decree, and the court below only decreed a divorce *a mensa et thoro*, which the wife resists and the husband seeks to maintain.

The bill charges cruelty of treatment and habitual drunkenness by the wife as the grounds for divorce; and while some of the allegations of the bill are overstated, and others given undue color, the proof shows a case of matrimonial infelicity that is truly deplorable. The case is an unfortunate one, both for the husband and the wife.

The parties have been married since 1866, but have had no children. They have lived in respectable society, and until the unfortunate habit was contracted by the wife of over-indulgence in the stimulants of intoxicating drink, they appear to have lived in entire harmony and in a state of happiness as husband and wife.

It appears that the wife had been for some years sorely afflicted with what the physician terms bronchial asthma, intermittent attacks of coughing, palpitations of the heart, and difficulty of breathing; and to such an extent was she so afflicted that she would have fainting spells which at times threatened the termination of her life. It was while she was so afflicted, and as means of relief, that she resorted to the use of brandy and gin, and perhaps other alcoholic stimulants. It is shown that the habit in the use of these stimulants grew upon her gradually, and from moderate use in the

beginning it became immoderate, and finally ran into distressing excesses. This habit was acquired with the knowledge and under the immediate observation of the husband; and while the proof shows that he was kind and indulgent to his wife, it is not shown that he ever attempted to arrest or break up this unfortunate habit by the resort to any means of cure and reformation, or even of temporary restraint.

We shall not attempt any recital of the details of the evidence. Such recital could serve no useful purpose, in the view we have of this case. Suffice it to say, that the charge of cruelty of treatment by the wife, in the sense of bodily harm or serious danger to health of the husband, is not supported in proof, as the law requires, to make it the ground for a decree of separation. The only personal violence offered to the husband, as shown by the proof, occurred on some two or three occasions, when he had interposed between the wife and his mother, the latter living in the house of her son, and as between whom and the wife there seems to have been difficulties and frequent boisterous altercations, and which, upon two or three occasions, resulted in personal violence to the mother-in-law. These outbreaks of passion and violence, as shown by the proof, never occurred except when the wife was under the influence of drink, and was without self-control. All this, though disgusting and reprehensible to the greatest degree, does not establish the fact of such cruelty of treatment of the husband, according to the requirements of law, as will justify a decree of divorce on that ground. Indeed, we do not understand it to be seriously contended that, as an independent ground, cruelty of treatment is sufficiently shown to justify a decree.

The ground principally relied on in support of the decree below is the habit of intoxication and its attendant consequences, to which we have referred as constituting a case of excessively vicious conduct by the wife within the meaning of the statute. The terms "excessively vicious conduct" are very indefinite; and of the multitude of vices to which humanity is subject, the legislature has given no intimation as to the class or character of vices to which the statute was intended to apply. It would, however, be difficult to suppose that it was intended to apply to all the multiform vices to which mankind is liable, though indulged in to an excessive degree. The terms "excessively vicious conduct" were originally employed in the act of 1841, chapter 262, which was the

act that first conferred jurisdiction on the court of chancery to grant divorces in this state; and from that time to the present, in the multitude of applications for divorces for various causes, we are not aware that it has ever been held, or even suggested, that the habit of drunkenness, of either man or woman, was sufficient ground *per se* for a divorce. It may, no doubt, in connection with other grave offenses against the marriage relation, be considered as an element in the habit and conduct of the party complained of; but as an independent ground, drunkenness has never been considered, either in this state or in England, as furnishing cause to justify a divorce. It is true, in some of the states of this Union, there are statutes that make habitual or continual drunkenness a cause for divorce; and we must suppose that if it had been the intention of the legislature of this state to make drunkenness a cause of divorce, it would have been so expressly declared, and not left to doubtful construction or implication. If the terms of the statute were construed to embrace such a cause of divorce, it would, of course, have mutual application; that is, it would furnish ground for divorce, upon the complaint of the wife against the husband, equally as upon the complaint of the husband against the wife; and so it would apply to all grades and conditions of society. And if the statute were so construed, and the courts opened to applications founded upon that cause, it would not be difficult to foresee that applications for divorces would immensely increase, with all their attendant evil consequences, and that facility would be furnished for obtaining divorces that has not hitherto been supposed to exist.

In this state it has been repeatedly declared that the marriage relation is not to be disturbed for any but the gravest reasons, and only upon such state of facts as show to the entire satisfaction of the court that it is impossible that the duties of the married life can be discharged. Public policy and morality alike condemn these judicial separations of husband and wife, except where it cannot be avoided; for, as it has been justly said, such separations throw the parties back upon society in the dangerous character of a wife without a husband, and a husband without a wife. The court, therefore, is always very reluctant in any case, and it should be specially so in a case like the present, to interpose to separate the parties, where it can perceive that the evil complained of may possibly be corrected by the exertion of proper influence, or

such reasonable authority as the nature of the case may justify. And this is a principle upon which courts of the highest authority have proceeded.

In the case of *Scott v. Scott*, 29 L. J., N. S., 64, the facts were quite analogous to the facts of this case, though somewhat stronger in support of the application of the husband. There the husband petitioned for separation from his wife on the ground of her habits of drunkenness and consequent bad conduct. It appeared that the wife, when under the influence of drink, was sometimes violent and impatient of restraint, or attempted restraint, of her husband; and the habit continued for many years, until finally the husband left the house, taking his daughter with him, in consequence of the conduct of the wife. On the case thus presented, the court, treating the wife's drunkenness as the direct and primary cause of her acts of violence, dismissed the petition. The learned judge said: "Having carefully considered the evidence, I think I must dismiss the petition. No doubt the respondent is a drunken, profligate woman, likely to make her husband's house very miserable. But I cannot avoid seeing that the real ground of the application is, that the husband wishes to get rid of a drunken wife, and I must be cautious about opening the court to cases of that description. The wife may have an unruly propensity in her drunken fits to destroy property, but there is no evidence of such *sævitia* as would justify me in decreeing judicial separation."

And so in the case of *Brown v. Brown*, L. R. 1 Pro. & D. 46. In that case, the application was by the wife against the husband for a decree of separation, upon the ground of habitual drunkenness of the husband, and it was held by Lord Penzance that habitual drunkenness and a series of annoyances and extraordinary conduct on the part of the husband did not constitute legal cruelty, to justify judicial separation. His lordship, in the course of his opinion, said: "The court is not permitted to indulge its feelings at the expense of unsettling the law or break with the decided cases to sympathize with the petitioner's misfortunes. A decree that should establish habitual drunkenness to be of itself ground for judicial separation would be likely to have a wide application."

The same principle was acted on in the case of *Mason v. Mason*, 1 Edw. Ch. 284, in which the opinion of the vice-chancellor was affirmed by the chancellor. In that case the application was by the wife against the husband for a divorce

mensa et thoro, upon the ground of habitual intoxication; and the court denied the application, and in its opinion, said: Frequent intoxication constitutes the principal, if not the only, source from whence has proceeded the misconduct of which the wife complains. I cannot admit this propensity, or the occasional or even frequent indulgence of it, to be of itself a sufficient ground for a bill of this sort. The court is not to add to the deplorable consequences of intemperance by making it, however excessive, the sole cause of severing the conjugal tie."

The evidence in this case exhibits a domestic state well calculated to excite sympathy for the husband. The broils in his family, made by the wife with his mother, the gross and revolting language of the wife upon these occasions, and the very reprehensible methods resorted to by the wife to procure liquor to gratify her thirst, were all facts well calculated to produce disgust and extreme mortification in a husband possessed of any degree of refinement. But all this conduct was that of an unfortunate woman who had become addicted to the habit of occasional intoxication, and the proof shows that it was only when she was under the influence of strong drink that she was guilty of the gross improprieties referred to in the evidence. And however deplorable this state of things may be, it is quite certain that the courts cannot interfere to furnish relief against all the troubles and distresses that may exist in the matrimonial relation. By far the greater number of these must be left to the good sense and judicious management of the parties themselves. The husband must exert his influence and authority over the wife for the correction of her bad habits. As has been said by a great authority (Lord Stowell), it is the law of religion, and the law of the country, that the husband is intrusted with authority over his wife. He is to practice tenderness and affection, and obedience is her duty. Within and by a proper observance of this principle, it may be hoped that the husband will be able effectually to restrain the unfortunate habit in his wife, of which he complains, and to restore the happy relation between the wife and himself that formerly existed.

It results from what we have said, that the decree of the court below must be reversed, and the bill be dismissed, with costs.

DIVORCE. — Drunkenness, though long and continued, and even excessive, is not of itself such cruelty as will constitute a ground for divorce: Note to *Morris v. Morris*, 73 Am. Dec. 628.

DOUGHERTY v. MOORE.

[71 MARYLAND, 242.]

TO CONSTITUTE VALID GIFT BETWEEN LIVING PARTIES, THERE MUST BE DELIVERY of the subject-matter of the gift with the intent on the part of the donor to transfer the right of property to the donee or to some one for his use; the donor must renounce and the donee must acquire the title and interest in the property given. An entry, therefore, made by a husband in a pass-book of a savings bank, to the effect that, in consideration of his love and affection for his wife, he gave her all the money credited or to be credited to him in the book, where, after the making of such entry, he continued to make deposits and to draw from the fund, from time to time, as he saw fit, does not constitute a valid gift to the wife of the money on deposit. Nor does it operate as a testamentary disposition thereof, because it is not executed as the law requires.

ACTION brought to determine the title to certain sums of money. The court below decreed that the funds in controversy belonged to the estate of Lawrence McDonald, deceased. Other facts are stated in the opinion.

Fetter S. Hoblitzell, for the appellants.

Frederick W. Story and Edward Otis Hinkley, for the appellees.

ROBINSON, J. This is a controversy in regard to the title to two funds, or sums of money, held on deposit by the Eutaw Savings Bank of Baltimore and the Savings Bank of Baltimore, and claimed, respectively, by the administrator of the wife and the administrator of the husband.

McDonald, the husband, opened an account in the Eutaw Savings Bank in 1864, and running down to 1887, when he died. The account was opened in his own name, and so continued till the 19th of February, 1868, when the name of his wife was added; and thereafter, the entry in the pass-book of the bank and in the ledger of the bank read:—

“Lawrence McDonald.

“Sarah McDonald, and the survivor, subject to the order of either.”

On the 4th of January, 1876, the following entry was also made: “In consideration of my natural love and affection for my wife, Sarah McDonald, I give to her all the money belonging to me credited or to be credited in this book, and I direct the same be paid to her, and her receipt shall be good for the same.

“LAWRENCE ^{His} X McDONALD.”
mark.

After these entries were made, McDonald continued to make deposits from time to time, and to draw money on account of the same, as his wants or convenience required, the sum of six hundred dollars being drawn by him two days only before he died.

His wife also drew money from time to time, upon her presenting the pass-book to the bank, and having the several amounts credited thereon, as required by the rules and regulations of the bank.

The husband and wife died on the same day, the wife surviving her husband little more than one hour.

The question, and the only question, it seems to us, is, whether there was a valid gift by the husband to his wife, of the money held on deposit by the bank.

All agree that, to constitute a valid gift between living parties, or gifts *inter vivos*, as they were distinguished by the civil law, there must be a delivery of the subject-matter of the gift, with the intent on the part of the donor to transfer the right of property to the donee, or to some one for his use. The donor must renounce and the donee must acquire the title and interest in the property given. So long as there is a *locus penitentiae* in the donor, the right to change his mind, to modify or revoke it, the gift is incomplete. As was said by Gibbs, C. J., in *Bunn v. Markham*, 7 Taunt. 214: "There is no case which decides that the donor may resume the possession, and the donation continue." Nor will the mere fact of possession in itself be sufficient; but it must appear that such possession was acquired with the consent of the donor, and with the intent on his part to relinquish all right and interest in the subject of the gift, and making it the property of the donee. These are familiar principles, about which there can be no contention.

"If the thing be not capable," says Chancellor Kent, "of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession but with the dominion of the property": 2 Kent's Com. 439.

Here the subject of the gift is money on deposit in a savings bank, and it is admitted there was no actual delivery of the money itself by the husband to the wife. If so, the question then is, whether the act or acts of the husband are in a legal sense equivalent to an actual delivery of the money. We shall not stop to consider whether an assignment, in writing, and delivery to a donee of a pass-book of a savings bank, by

the donor, with the intention to give and vest in the donee the immediate right and interest in the money held on deposit, will constitute a valid gift of such deposits. In some states it has been held that such an assignment and delivery will vest in the donee a valid title to the money. It is sufficient to say there was no delivery by the husband to the wife of the pass-book of the bank in this case with the intention on his part of renouncing all interest in the deposits, and of transferring to her the absolute title to the same. In the first place, there was no delivery of the pass-book itself to the wife. It was kept, it appears, both before and after the entries of the 19th of February, 1868, and the 4th of January, 1876, in the bureau drawer in the dining-room, within the reach and under the control of the husband. Much less is there any proof of its delivery to the wife, with the intention, on the part of the husband, of renouncing all interest in the money. On the contrary, years after these entries, and in fact during his life, he continued to draw money and appropriate it to his own use, showing beyond question that he never meant to relinquish his right and dominion over the deposits. Now, if there was a complete gift of the money to the wife, if in fact it belonged to her, then he had no right to appropriate it to his own use. One cannot give property to another, and then take it back. Once establish the gift, and the property belongs to the donee; but there can be no gift in law so long as the donor retains the control and dominion over the subject of the gift. A mere promise to give, however explicit, will not be sufficient, for the reason that the promise being made without consideration, it cannot be enforced: *Pennington v. Gittings's Ex'r*, 2 Gill & J. 208; *Murray v. Cannon*, 41 Md. 466; *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 486.

Although the husband, in this case, did not mean to relinquish his right to use the money on deposit, during his life, he did mean, that whatever remained in the bank at the time of his death should go to his wife, if she survived him. But these entries cannot operate as a testamentary disposition of property, because they are not executed as the law requires. We are of opinion, therefore, that the money held on deposit by the Eutaw Savings Bank belongs to the administrator of the husband, and not to the administrator of the wife. The claim of the administrator of the wife to the money on deposit in the Savings Bank of Baltimore rests on no better ground. The entry in the pass-book here reads:—

"Lawrence McDonald, subject also to the order of Sarah McDonald." In other words, the money deposited belonged to him, but was subject to the order of himself or his wife. She had the authority to draw money, and all checks drawn by her were, it appears, signed "Sarah McDonald, for Lawrence McDonald."

The subsequent entry of the 4th of January, 1876, "in consideration of my natural love," etc., is precisely the same as in the pass-book of the Eutaw Savings Bank, the effect and operation of which we have already considered.

For the reasons already assigned, we are of opinion there has been no valid gift by the husband to the wife of the money on deposit in this bank, and the decrees below must therefore be affirmed.

Decrees affirmed.

TO CONSTITUTE A VALID GIFT, there must be, on the part of the donor, an intent to give, and an actual or symbolical delivery of the subject-matter of the gift, as well as an acceptance on the part of the donee: *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531, and note; *Yancey v. Field*, 85 Va. 756; *Savings Bank v. Fogg*, 82 Me. 538. Thus a gift by a father to his son of certain securities, accompanied by actual delivery and retained possession, is valid, and vests title in the son, as against the heirs or personal representatives of the donor: *Beardslee v. Reeves*, 76 Mich. 661.

SUPREME COUNCIL OF AMERICAN LEGION OF HONOR v. GREEN.

[71 MARYLAND, 268.]

DECISION OF COURTS OF STATE CONSTRUING STATUTE THEREOF, WHEN FOLLOWED IN OTHER STATES. — Where the decisions of the courts of Massachusetts have settled what a statute of that state authorizes to be done under it, those decisions are controlling as to the effect and meaning of the statute, and the courts of Maryland will follow them as making a part of the law of the state, no matter whether they are entirely in harmony with decisions of other states upon somewhat similar statutes, or not.

STATEMENT IN APPLICATION FOR INSURANCE IN BENEFICIAL SOCIETY, WHAT MATERIAL. — Where one of the objects of a beneficial corporation chartered under a statute authorizing it to pay to the widows, orphans, relatives, or dependents of a deceased beneficial member a sum of money is to establish a benefit fund out of which is to be paid to the family, orphans, or dependents of a deceased beneficial member a certain sum of money, a statement in an application for membership and insurance in such society which describes the beneficiary as the niece of the applicant is material; and if it be shown that there was no kinship between them,

such false statement in the application will defeat an action to recover the payment of the insurance money, it being provided in a subsequent clause of the application that any false statement therein should forfeit all rights of the applicant or of his beneficiaries.

AGREEMENT TO ACT TOWARDS EACH OTHER AS UNCLE AND NIECE cannot have the effect to make the parties thereto uncle and niece within the meaning of a statute authorizing benefits to be paid to the "relatives" of a deceased member of a beneficial corporation.

BENEFICIAL CORPORATION IS NOT ESTOPPED TO DENY TRUTH OF STATEMENT contained in an application for membership and insurance therein by the hearsay information of one of its officers, who was in no way charged with the duty of ascertaining the truth or falsity of such statement.

ACTION on a contract of insurance. The opinion states the case.

John H. Handy, for the appellant.

Thomas R. Clendinen, for the appellee.

IRVING, J. This suit was instituted by the appellee, as plaintiff, to recover upon a contract of insurance effected by one Thomas H. Evans upon his own life, for the sum of three thousand dollars, for the benefit of the plaintiff. The insured, Thomas H. Evans, was a charter member of Reliance Council, No. 1069, of American Legion of Honor, which was organized in December, 1882; and as such member he had taken out a certificate insuring his life for the benefit of the plaintiff in this suit, who is named in the application as "Elizabeth A. Green, my niece." The appellant is a corporation chartered under the laws of Massachusetts, which are found in the Revised Statutes of that state, chapter 115; and section 8, as amended by the act of 1882, chapter 195, contains the provisions under which this controversy arises.

That section reads as follows: "A corporation organized for any purpose mentioned in section 2 may, for the purpose of assisting the widows, orphans, or other relations of deceased members, or any persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process; and associations may be formed under this chapter for the purpose of rendering assistance to such persons in the manner herein specified."

In the fifth section of article 2 of the constitution of the

supreme council of the Legion of Honor the object of the order, so far as it affects this case, is declared to be "to establish a benefit fund, from which, on satisfactory evidence of the death of a beneficial member of the order who has complied with all its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family, orphans, or dependents, as the member may direct."

The payment of this insurance money (the insured having died) is resisted by the appellant, upon the contention that the appellee does not belong to the classes, or any one of them, whom the corporation designed to assist or benefit, or which the statute of Massachusetts authorized to be provided for. It is also resisted on the ground that in his application for membership and insurance the insured described the plaintiff (the beneficiary) as "my niece," whereas she was not his niece, and was in no degree related to him. This representation being untrue, it is contended that, under a subsequent clause of the application, there was a forfeiture of rights under the contract. That clause is as follows: "I do hereby consent and agree that any untrue or fraudulent statement made above, or to the medical examiner, or any concealment of facts in this application, or my suspension or expulsion from or voluntarily severing my connection with the order, shall forfeit the rights of myself and my family or dependents to all privileges therein."

What the statute of Massachusetts authorizes to be done under it has been settled by the decisions of Massachusetts courts, and those decisions are controlling as to the effect and meaning of the statute, and we should follow them as making a part of the law of the state, no matter whether they are entirely in harmony with decisions of other states upon somewhat similar statutes, or not. In *American Legion of Honor v. Perry*, 140 Mass. 589, it was most distinctly decided that the classes of persons intended to be benefited by the statute are plainly and expressly designated in the statute, and that no person not falling within that designation could be provided for by any corporation holding its charter under the laws of that state. This decision was made with reference to the appellant in this case. The suitor in that case was engaged to be married to the insured, but was not allowed to recover, because she was not embraced within the classes the law allowed insurance to be effected for. She was not the widow, the orphan, a relative, or a dependent in the sense of the statute. All subse-

quent decisions of that state recognize this as the law of that state: *Skillings v. Massachusetts Benefit Ass'n*, 146 Mass. 217. In order to recover, the insured knew that the appellee must be found to meet the description of some one of the classes designated in the act, and in order to meet that requirement she was named by the insured, in his application, as his niece, which declared her a relative, and therefore a qualified beneficiary, whether a dependent or not.

Now, the utmost good faith is required in such cases, and the applicant so knew; for he agreed in his application that any untruthful statement or any fraudulent statement or any concealment of facts should forfeit all rights under the insurance he was effecting. The association was entitled to know the facts, that they might agree or refuse to have the applicant a member and an associate in the society or not, and to allow the beneficiary named to be the recipient of its provisions for aid, as it might decide. It is contended that improper relations existed between the insured and the beneficiary named, to wit, the appellee, and that the designation of her as applicant's niece was a cover to conceal the true relation. The jury seem to have found that immoral relations did not exist, and of course that question is not before us. Whatever may have been the motive of the deceased for stating the plaintiff, the beneficiary, to be his niece, when she was not, is wholly immaterial to the question for decision. A relationship was stated to exist, which on its face placed the beneficiary named within one of the classes provided for by the corporation and allowed by the statute of Massachusetts; and the corporation was called on to look no further, but might rely on the warranty of its truth, and the agreement to forfeit if falsely stated. It is not pretended there was any kinship in fact between the parties. It is conceded that there was not. The plaintiff testifies that there was not any relationship by blood, but says she called him uncle, and he treated her as a niece, by mutual understanding. It is very clear that their agreement to act towards each other as uncle and niece could not have the effect to make them such, and bring her within the class named in the statute as relatives, so as to make her a qualified beneficiary to take under the statute as a relative. The question of dependency we are not now considering. She is not named in the application or in the policy (or certificate) as a dependent, but as niece, and it was as niece she was intended to take; otherwise she would not have been so described.

The relation of the parties to each other was certainly very peculiar, and on the theory of entire purity the deceased was marvellously generous; but whether she could be regarded as a dependent within the meaning of the society's constitution and the statute of Massachusetts would admit at least of serious doubts, if the case turned on that point. We think the false statement of the insured, that the appellee was his niece, so manifestly material, as it declared her a relative and qualified beneficiary, in view of the warranty of its truth, and agreement to forfeit rights if false, should defeat this action. This is according to sound principle: Bliss on Life Insurance, secs. 47, 48, 82.

Two cases only have been cited as maintaining a contrary view, and establishing that an incorrect statement of relationship will not avoid the contract; but a careful examination of those cases discloses such material differences in the facts, the questions involved, and the law under which the decisions were made, that they are not adverse to our view.

In the case of *Equitable Life Assurance Soc. etc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 525, insurance was taken out in favor of a woman designated as the wife of the insured. She was married to him, lived with him, and was reputed as his wife till he died. Payment was resisted on the ground that there was an entire want of insurable interest, because it was alleged she was not the lawful wife of the deceased, her lawful husband being still alive. By the statutes of Georgia, sections 2671 and 2672, it is provided that variation from the truth in anything affecting the risk shall avoid the policy; but that if a party states *bona fide* what he believes to be the truth, the policy shall not be void, though he was mistaken. This is the substance of the statute. The lower court instructed the jury that the failure to state the true relations of the parties did not avoid the policy. The supreme court reversed that ruling, and held it would avoid unless the insured *bona fide* believed his statement to be true. The court said the true inquiry under the statute was, whether the statement was knowingly false,—that is, whether the insured knew, when he made the statement, that his so-called wife's husband was living,—and that the jury should have been told that if the insured did not know, when he made the statement, that the husband was living, he was acting *bona fide*, and the contract was not avoided; but that if he did know that fact, and kept back part of the truth, then the policy was void. This case sustains rather

than conflicts with our view. There the statute supplied the rule, which the warranty and agreement in this case do, to govern the case.

The other case relied on by appellee's counsel is *Durian v. Central Verein of the Hermann's Soehne*, 7 Daly, 168. This was a case in the court of common pleas of the city and county of New York, and it is not therefore a binding authority even in New York; but when examined it presents a very different case from the one which we are considering. In that company, and under the law then prevailing, it seems a member of the society could designate anybody as beneficiary. There was no restriction in that regard, as under the law of Massachusetts and of the Legion of Honor. An entire stranger was an eligible beneficiary. There does not appear to have been any warranty of truth of the statement, nor agreement to forfeit if untrue statement was made.

A person was named as wife who was not such in fact. The court held that the person who was intended to take was plainly designated by name, and that this was enough to entitle her to recover. The real question in that case was, whether the applicant in this case could designate any one but a wife as beneficiary. At the time he joined, his wife's name was registered, according to the rules of the society, and she contended that her right was vested, and could not be divested by any change in the constitution of the society, and subsequent change of designation by the husband. Real husband and wife were living apart, and the husband designated another woman, with whom was living, and who adopted his name and passed as his lawful wife till his death. This adopted wife was allowed to recover, to the exclusion of the wife who was originally named as beneficiary, or to be more exact, who had been originally registered as his wife, under the rules of the company. The decision turned on the right to designate the person named as beneficiary; and the person being designated clearly, the designation of her as "wife," when she passed as such, but was not so, was held not to disentitle her. The relationship of the parties in that case had no bearing on the rights of either. Anybody could be beneficiary. That case, therefore, is not inconsistent in any degree with the view we take.

It is contended, however, that the appellant is estopped from saying the appellee is not the niece of the deceased, because Dr. Pennington, who witnessed the application of the deceased,

knew, or had heard, she was not his niece. His testimony on this subject is embodied in the first and second bills of exception.

Dr. Pennington was grand secretary of the Grand Council of the American Legion of Honor, and, as such officer, was present at the institution of this subordinate council, of which the deceased was a charter member. He witnessed signatures, he says, of Evans, to the application and obligation, though the record does not show that he attested anything but the subscription of the obligation. Reliance Council not having been then organized, there was no secretary elected and acting for it, and he performed certain duties which such secretary would have performed had there been one. He says it was his duty to see that the blanks were filled, but that it was not his duty to see how they were filled, or "to pass on the propriety of the filling." He says he usually cast his eye over them to see if they were properly filled, and presumes he did so in this case, though he has no recollection whether he did or not. He says he had heard, before that time, that the appellee was not the niece of Evans, but he had no personal knowledge on the subject, and does not recollect having paid any attention to the statement in the application that she was his niece, and he does not know that he would have called attention to it had he noticed it, as he had no personal knowledge on the subject. He further says it was no part of his duty to pass on the capacity of the beneficiary. He further says he was not and never had been "an officer of the Supreme Council of American Legion of Honor, but might be considered its agent in organizing Reliance Council"; that he was "only grand secretary of the Grand Council, which had nothing whatever to do with the widows' and orphans' fund."

Upon this testimony, and careful examination of the constitution and laws of the order, in both its branches, we cannot find any ground for holding Dr. Pennington was such agent of the Supreme Council as to affect it, through him, with notice of a fact which Dr. Pennington had only heard of incidentally, and long before, and of the truth or falsity of which he had no personal knowledge.

In the first place, the Grand Council, of which he was secretary, had nothing to do with the benefit fund. His statement to that effect is fully borne out by the constitution and laws of the order. In the second place, he was not by any law charged with the duty of instituting new councils or receiving applica-

tions for membership; still, in this case, by somebody's authority or permission, he did institute Reliance Council, and his action was accepted as regular and lawful, and the council proceeded to work. Whilst it was his duty to receive the applications of charter members for transmission to the supreme lodge or council, and to see that they were in proper form, and with blanks all filled up, he says it was not his duty to examine into or pass upon the qualification of any beneficiary who might be named in the application. It was subject of change, and needed no special looking after. He was only to see that they were all prepared to ballot among themselves, whether they would associate with one another as members. As instituting officer, Dr. Pennington received Evans and his application. His duty at most was that of a special instituting officer. Section 4 of law 5 defines the duty of the instituting officer: "It shall be the duty of the instituting officer to see that the medical examiner is legally qualified (by making application to supreme commander, who shall issue a commission); to deliver to the medical examiner the instructions to the medical examiner; to inspect the medical examinations of all the petitioners, and refer them to the medical examiners-in-chief for decision, and see that the papers are correct in form, and that the laws are complied with before permitting the applicants to ballot; to explain to the petitioners the duties of each officer of a council before an election is had; to instruct the officers in their respective duties, and to exemplify the secret work."

Thus it is seen that the instituting officer was charged with no duty respecting the application, beyond seeing it was in proper form, and it and all the papers, including examination by medical examiner, by section 1 of law 111, would be forwarded to the supreme secretary of the supreme council, which had sole control of the benefit fund. The instituting officer's sole duty, therefore, so far as this application is concerned, was to see it was in proper form, and if it was, it passed from his hands to the supreme council, of which he was no officer. The effort to liken it to the duties of a general soliciting agent of an ordinary insurance company, who is charged with the duty of making certain inquiries, the truth of which is essential to the company to be known, cannot be sustained. There is no analogy. The general rule is properly laid down by Bliss on Life Insurance, secs. 112-121; but the rule there laid down, and approved by the supreme court in *Union M. L. Ins.*

Co. v. Wilkinson, 13 Wall. 222, has reference to regular insurance companies, operating through agents specially charged with the duty of securing information respecting the assured; but we cannot see that it can control this case, and estop this corporation, by hearsay information of an officer not charged with the duty of ascertaining the qualifications of a beneficiary named by the insured as the person to receive the insurance money upon the death of the insured. In fact, no provision seems to be made for charging any body with the duty of inquiring into the truth of applicant's statement of the character of the beneficiary he might name. The corporation seems to have relied wholly, in that regard, on the warranty of truth on the part of applicant and agreement to forfeit if false. He warranted his statement true, and took the consequence of falsehood by forfeiture if false. Whether his statement was fraudulent or not does not seem to be open to inquiry. It was a false statement—a misleading statement—that the beneficiary was a lawful beneficiary, and the corporation had no further inquiry to make. She is declared a relative, and not a dependent; so that all that was necessary for the appellant to show was that she was not a relative, in order to obtain protection through the warranty of truth, and agreement to forfeit if false.

Entertaining this view, it follows that there was error in admitting the testimony excepted to in the first and second exceptions, and in rejecting the appellant's first prayer. It also follows that there was error in granting all the plaintiff's prayers. We understand, from the proof and concessions, that the appellee was not the niece or relative of the insured, and under our ruling we see no occasion to order a new trial. We shall therefore reverse, without ordering a new trial.

Judgment reversed.

STATUTES.—A statute adopted from a sister state which has received a settled and uniform construction by the courts of that state should be given a similar construction by the state adopting it: *Munson v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 592, and note. The construction of a Missouri statute made by the highest court of that state should be followed by courts of other states: *Hamilton v. Hannibal etc. R. R. Co.*, 39 Kan. 56.

FALSE STATEMENTS OF ASSURED.—In the absence of such statutory provisions as are usually in force in cases of ordinary insurance, false statements on the part of the assured, if made contrary to the agreement of the parties, will vitiate an insurance policy, even though such statements are not material to the risk: *Whitmore v. Supreme Lodge*, 100 Mo. 37. Compare note to *Union Mutual Ass'n v. Montgomery*, 14 Am. St. Rep. 526.

BEARD v. STATE.

[71 MARYLAND, 275.]

EVIDENCE ADMISSIBLE UNDER INDICTMENT FOR MAINTAINING DISORDERLY HOUSE. — Under an indictment for keeping a disorderly house, and permitting lewd persons to frequent it, it is competent to prove, by witnesses, the reputation for lewdness of the women who frequented the house, that they frequented the house in company with men, and also specific acts of lewdness committed by some of the women elsewhere.

COURT IS NOT PROHIBITED FROM INSTRUCTING JURY, IN ADVISORY FORM, AS TO LAW in a criminal case by a constitutional provision that "in the trial of all criminal cases the jury shall be the judges of law as well as of fact," when the jury unanimously request such instruction.

DISORDERLY HOUSE, WHAT IS. — A bar-room and dance-hall, with music, kept for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and where such persons habitually assemble to drink and dance together, is a disorderly house, although it is quietly kept, and no conspicuous improprieties are permitted inside.

INDICTMENT for keeping a disorderly house. The opinion states the case.

R. Stockett Mathews, for the appellant.

William Pinkney Whyte, attorney-general, for the appellee.

ALVEY, C. J. The traverser in this case was indicted for keeping a disorderly house, and upon trial by a jury, was convicted of the offense.

The indictment consists of a single count. It charges that the traverser unlawfully and willfully did keep and maintain "a certain common, ill-governed, and disorderly house there situate; and in the said house, for his own lucre and gain, certain persons of evil name and fame, and of dishonest conversation, to frequent and come together, etc., unlawfully and willfully did cause and procure; and the said persons in the said house, at unlawful times, as well in the night as in the day, then, etc., to be and remain, drinking, tippling, cursing, swearing, quarreling, and otherwise misbehaving themselves, unlawfully and willfully did permit, etc.; to the great damage and common nuisance of all the liege inhabitants of the state there inhabiting," etc. The indictment is in the ordinary common-law form, and accurately describes the offense, with some unnecessary degree of particularity: *Rex v. Higginson*, 2 Burr. 1232; 2 Chitty's Crim. Law, 673. The offense is that of a common nuisance, and it is necessary that the indictment should contain facts to show that a common nuisance has

been created or permitted. This is done by allegation of such facts as show that the traverser maintains, promotes, or continues what is noisome and offensive or annoying and vexatious or plainly hurtful to the public, or is a public outrage against common decency or common morality, or which tends plainly and directly to the corruption of the morals, honesty, and good habits of the people; the same being without authority or justification of law: 3 Greenl. Ev., sec. 184, and the authorities there cited.

Such being the general principles upon the subject, it is in the light of and with reference to those principles that the questions raised in this case must be decided.

There were three bills of exception taken by the traverser. The first and second exceptions present questions as to the admissibility of evidence. These questions are, whether it was competent to the prosecution to prove, by witnesses, the general reputation or character of the women for lewdness who frequented the house kept by the traverser, and to prove that such women frequented the house in company with men, and whether it was competent to the prosecution to prove, by witnesses, specific acts of lewdness by some of the women who resorted to the traverser's house, as showing what their habit and vocation really were, though such acts of lewdness did not occur on the premises of the traverser.

We can perceive no possible objection to the admissibility of such evidence. Evidence of the general reputation of the house was inadmissible; but the general reputation of those who frequented it was admissible, for the purpose of characterizing the house and showing the object of their visits: *Henson v. State*, 62 Md. 233, 235; 50 Am. Rep. 204; *Herzinger v. State*, 70 Md. 278. And as the object of the inquiry was to show the disreputable and degraded character of the women who found admission to the house of the traverser, it was unquestionably competent to show it either by proof of general reputation, or by proof of particular acts of lewdness, to the knowledge of witnesses; and it could make no difference where such acts occurred. We are therefore of opinion that the court below was clearly right in allowing all the facts and circumstances stated in these exceptions to go to the jury, to be considered by them. But all possible objection to the evidence excepted to, if there could have been a question in regard to it, would seem to have been entirely removed by the testimony introduced by the traverser himself, in the subse-

quent progress of the trial. He proved by his own witnesses that the women who frequented his house were street-walkers; that their general reputation was bad; and that some of them the witness had met in houses of prostitution. With this evidence before the jury, introduced by the traverser himself, it is not perceived upon what ground he could ask the reversal of the rulings, upon the evidence offered by the state, to which he excepted.

We come now to the third exception; and the questions presented by that exception are, whether it be competent to the judge presiding at the trial of a criminal case to give an advisory instruction to the jury when requested so to do; and if it be competent so to instruct, whether the instruction given in this case was correct or not. These questions have been argued by counsel with much zeal and ability, and doubtless they are of great importance in the correct and faithful administration of the criminal law of the state.

It appears that after the case had been fully argued to the jury, by counsel, the jury retired to consider of their verdict, and after being out many hours, they were brought into court and questioned as to whether they had agreed. They stated, through their foreman, that they had not agreed upon a verdict, and that there was no likelihood of their being able to agree. Whereupon one of the jurors suggested that he thought it probable that a verdict could be had if the jury were instructed as to the law governing the case. To this the judge replied that he would instruct the jury if they unanimously requested him to do so, and directed the foreman to ascertain whether it was the wish of all the jurors that they should be instructed. The foreman, after consulting the panel, announced that the jury were unanimous in their desire to be instructed as to the law. But the counsel for the traverser objected, and earnestly protested against such instruction being given, and insisted that the jury were the exclusive judges of the law as well as of the facts in criminal cases, and therefore the court ought not to interfere. However, the court, notwithstanding the protest of counsel, reduced to writing and read to the jury the following instruction: "If you find, from the evidence, that the traverser kept a bar-room and dance-hall, with music, for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and that such persons habitually assembled there to drink and dance together, then you may find said

establishment a disorderly house, within the meaning of the indictment, even although you may also believe that the house was quietly kept, and no conspicuous improprieties were permitted inside. The jury being the judges of the law as well as fact, this charge is to be understood as advisory only of what the law is."

In the first place, it is argued that the judge had no right to give the instruction against the protest of the traverser; and in the second place, that the instruction was erroneous in principle, and not within the terms of the indictment, and therefore misleading in its effect upon the jury.

1. The constitution of the state, article 15, section 5, is very explicit in declaring that "in the trial of all criminal cases, the jury shall be the judges of law as well of fact." But it has been held by our predecessors that this provision of the constitution is merely declaratory, and did not alter the pre-existing law regulating the powers of the court and jury in the trial of criminal cases: *Franklin v. State*, 12 Md. 236. Both before and since the constitutional declaration upon the subject, it was and has been the practice of judges in some parts of the state to decline to give instructions to the jury in criminal cases under any circumstances, while in other parts of the state it has been the practice for the judges to give advisory instructions when requested so to do. It seems to have been regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other. Whenever, however, the judge has thought it proper to instruct, it has always been deemed necessary that he should be careful to put the instruction in an advisory form, so that the jury be left entirely free to find their verdict in accordance with their own judgment of the law as well as the facts. The instruction, when given, goes to the jury simply as a means of enlightenment, and not as a binding and positive rule for their government, as it does in civil cases. The judge, therefore, cannot, by any instruction given in a criminal case, bind the jury as to the definition of the crime, or as to the legal effect of the evidence before them. He can only bind and conclude the jury as to what evidence shall be considered by them, he being the exclusive judge of what facts or circumstances are admissible for consideration. The practice of instructing the jury, within the limitations and under the restrictions just stated, has received the sanction of this court upon more than

one occasion, and such practice must now be regarded as fully authorized: *Wheeler v. State*, 42 Md. 563, 569; *Broll v. State*, 45 Md. 356; *Bloomer v. State*, 48 Md. 521, 538; *Forwood v. State*, 49 Md. 537; *Swann v. State*, 64 Md. 425. And such practice is founded in the soundest practical reason and good sense. For though the juries are made judges of the law, they are unlearned, and not infrequently composed, in part at least, of persons wholly uninstructed as to the laws under which they live. When sworn upon the panel, it becomes their duty to decide the case according to the established rules of law of the state, and not according to any capricious rules of their own; and it must be supposed that they are always desirous of performing their duty, and making their verdicts conform to law. To enable them to accomplish that object, no proper light should be withheld from them. In the argument of the case before them by counsel, text-books, no matter of what authority, or whether of any authority at all, reported decisions of all grades of courts, from the highest to the lowest, and no matter where made, are read to the jury, with the gloss of counsel, to enforce certain theories, and the jury are required to discriminate and decide, upon the authorities cited, as to what is the law in their own state, which they are sworn to administer. In such state of doubt and perplexity, is it not reasonable and proper that they should have the advisory aid of the judge, who is supposed to know what the law of the state really is, and who has the ultimate power of revising and setting aside their verdict, if they should mistake and misapply the law, to the injury of the accused? It would seem that there could be no room for a diversity of opinion upon this question; and no case could more fully illustrate the propriety of the practice than the present. If the instruction given be erroneous, though in a mere advisory form, it may be made the subject of an exception, to be corrected on appeal: *Swann v. State*, 64 Md. 425.

2. The remaining question is, whether there was error in the instruction given. As we have seen, it was advisory only, and in no way binding on the jury. And we perceive nothing in its terms to make it erroneous. If in fact the place was kept by the traverser "for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of the company, and that such persons habitually assembled there to drink and dance together," the jury might well find the house to be disorderly within the meaning of the indictment.

ment, and according to settled principles of law. It does not require, in a case like the present, that there should be acts violative of the peace of the neighborhood, or boisterous disturbances, or open acts of lewdness shown, in order to constitute the place a disorderly house. The habitual assembling there of lewd women, and men desirous of their company, to drink and dance together, must necessarily be hurtful to the public, and tend to scandalize the neighborhood. It is an outrage against common decency and common morality, and could have no other effect than the corruption of the morals, honesty, and good habits of the people. And that constitutes the place a nuisance: 3 Greenl. Ev., sec. 184. The common-law form of an indictment specially adapted to a case like this simply charges that the party accused did keep and maintain a certain common, ill-governed, and disorderly house, for public dancing and music, and in said house, for his own lucre and gain, did cause and procure divers persons, as well men as woman of evil name and fame, and of dishonest conversation, to frequent and come together, to the great damage and common nuisance of the public, etc.: 2 Chitty's Crim. Law, 673. The crime consists in the keeping of the house as a place of habitual or common resort of people of evil name and fame, and of dishonest conversation, there to consort together, thus affording opportunities for and temptations to the indulgence of their bad habits and passions, to the evil example and scandal of the neighborhood. The indictment in this case fully embraces the facts which were required to be found by the jury under the instruction given by the court, and therefore there is no ground for the contention that the instruction is not supported by the indictment: *Cheek v. Commonwealth*, 79 Ky. 359, 362; *Thatcher v. State*, 48 Ark. 60; *Commonwealth v. Cardozo*, 119 Mass. 210.

Finding no error in the rulings of the court below, those rulings will be affirmed, and the cause remanded.

DISORDERLY HOUSE, WHAT IS. — A house which tends to public annoyance (*Commonwealth v. Hopkins*, 133 Mass. 381; 43 Am. Rep. 527), or which is used or resorted to by persons as a place for prostitution, is a disorderly house: *State v. Clark*, 78 Iowa, 492; *State v. Smith*, 15 R. I. 24.

DISORDERLY HOUSE, CHARACTER OF PERSONS FREQUENTING IT AS EVIDENCE OF. — Evidence of the lewd character of women who frequent a house is competent to show the character of the house: *Harwood v. People*, 26 N. Y. 190; 84 Am. Dec. 175, and note; *Hersinger v. State*, 70 Md. 279; *Sullivan v. State*, 75 Wis. 650; *State v. Mack*, 41 La. Ann. 1079; *State v. Toombs*, 79 Iowa, 741. Compare *Henson v. State*, 62 Md. 231; 50 Am. Rep. 204, and particularly note 209-211.

GAITHER v. WILMER.

[71 MARYLAND, 361.]

AMENDMENT OF DEFECTIVE VERDICT.—If, in an action on two promissory notes and on accounts stated, in which *non assumpsit* and set-off are pleaded, the jury return a sealed verdict for the plaintiff, without specifying the amount for which they find, the court has no power, after the verdict has been duly recorded, and the jury have separated, to amend the verdict, by inserting after the words "for the plaintiff," the words and figures "for the sum of \$5,378.72."

ASSUMPSIT. The appellee sued the appellant on two promissory notes and on accounts stated between them. The pleas were *non assumpsit* and set-off. The jury before whom the case was tried, not having agreed upon a verdict when the court adjourned, were permitted to return a sealed verdict the next morning. On being called on for their verdict, the foreman handed the clerk the sealed verdict, which stated that they found for the plaintiff, but did not specify any amount for which they so found. When the verdict was handed to the judge, he told the counsel in the case that there was a defect in the verdict, and asked them if they would agree to have it corrected. The defendant's counsel declined to do so, whereupon the clerk entered it upon his docket, and the jury, after expressing their acquiescence in it, left the box. Afterwards, on the same day, defendant's counsel moved for arrest of judgment and for a new trial, and plaintiff's counsel moved the court to reassemble the jury, and direct them to enter in their verdict for the plaintiff the sum of \$5,378.72, on the ground that in the progress of the case it was agreed before the jury, in open court, by counsel on both sides, that if they found for the plaintiff, then the plaintiff would be entitled to a verdict for that sum. On a subsequent day, defendant's counsel entered a *ne recipiatur* to this motion, on the grounds,—1. That such motion was contrary to the practice of the court; and 2. That the statements made therein were not true, no such agreement having been made in open court or anywhere else. The defendant's counsel then moved to quash the verdict, on the ground that it was uncertain, irregular, and a nullity. The next day, plaintiff's counsel filed an affidavit to the effect that during the trial a calculation of the amount claimed by the plaintiff was made by one of his counsel, which was reviewed by one of the counsel for defendant, and was written on a blackboard in sight of the jury, viz., the sum of \$5,378.72, which amount was still on the blackboard;

and that thereupon counsel for defendant admitted that if the jury found for the plaintiff, the amount so written was the proper amount for which to find a verdict. On a subsequent day, defendant's counsel filed an objection to the reception of this affidavit, but the court overruled the objection, denied the motions in arrest and for a new trial, and ordered the sealed verdict to be amended, by inserting after the words "for the plaintiff," the words and figures "for the sum of \$5,378.72," and on the same day rendered judgment on the verdict so amended, for the plaintiff, for this sum, with interest and costs. The defendant appealed.

William S. Bryan, Jr., for the appellant.

James M. Ambler and Randolph Barton, for the appellee.

MILLER, J. Without doubt, a verdict in an action like the present, simply "for the plaintiff," without stating the damages, or the amount the plaintiff is entitled to recover, is fatally defective. It is not merely an informal verdict, which the court can mold into proper shape by referring to the pleadings and issues, but it is substantially defective. In all cases where the action is upon a contract or for damages, the verdict, if for the plaintiff, must be for an amount specified; otherwise the court cannot enter judgment upon it for any amount: Proffatt on Jury Trial, sec. 415; 2 Tidd's Practice, 869; 1 Poe's Pleading and Practice, sec. 758; *Clement v. Lewis*, 3 Brod. & B. 297.

The question, then, is, Had the court power to amend this verdict, and make it effective, by inserting the amount the plaintiff was entitled to recover, at the time and under the circumstances stated? The amendment was made after the verdict was assented to by the jury, when called upon to hearken to it after it had been duly recorded, and several days after the jury had separated. The defect was discovered by the judge when the verdict was handed to him, before it was recorded, and when the jury were in attendance in open court, for the purpose of rendering their verdict. It was then competent for the jury to reject this verdict *in toto*, and find another, or to vary or correct it. The judge also could then have sent them to their room, with instructions to correct this defect, whether counsel assented or not; and this was the course that should have been adopted: *Edelen v. Thompson*, 2 Har. & G. 31. This amendment, however, must have been

made either upon the affidavit of the plaintiff's counsel, or by the judge's own recollection of what took place at the trial.

In England, verdicts in criminal as well as in civil cases have been frequently amended by the notes of the judge, or by some written document, and in a criminal case tried before Lord Denman, C. J., he ordered the verdict to be amended, though he had taken no notes at the trial. But when this order was brought before the court in bank, under a rule to show cause why it should not be rescinded, his lordship said: "I was of opinion that the judge must have power in a case like this to amend by his recollection; and it is clear that in the present instance, the amendment was one which might be made according to the truth of the facts. But on consideration we think that the practice of so amending would be such a dangerous one that, as a general rule of discretion, the court ought to decide against introducing it. In almost all the cases of amendment there has been a written document to amend by, and a misprision which was corrected by that. But if reference is made to the recollection of the judge as an individual, an unlimited number of affidavits from other persons will be let in, stating what passed according to their impressions. I have no doubt here; but on account of the great danger and abuse which might result from amending, under such circumstances, in cases which may be supposed, we think the order ought not to be sustained": *Regina v. Virrier*, 12 Ad. & E. 337.

In this country, decisions as to the amendment of verdicts are numerous, and a large number of them have been cited in argument. Some of them show that a general verdict may be applied to the proper count where some of the counts in the declaration are good, and others bad, or to one of two inconsistent counts; but that is not this case. Our code provides that no judgment shall be arrested because one or more counts in the declaration are bad, if there be one count sufficient in substance: Code, art. 75, sec. 9. But we have no statute which reaches a case like this. Again, in some of the cases cited, verdicts have been amended by reassembling the jury after they had separated, and after the verdict had been recorded, upon the affidavits of the jurors themselves that they had made a mistake, or intended to find differently; but in states where the common law is the only guide on the subject, we think the decided weight of authority is against allowing such a thing to be done; and we have found no American case in

which an amendment like this, in matter of substance, has been made upon affidavits, or from the judge's recollection of what occurred at the trial, after the imperfect verdict has been duly recorded, and the jury have separated. A citation or review of these authorities is unnecessary, because it seems to us that the question has been settled in Maryland by the decisions of this court.

Among the cases in the old provincial court (1716), we find an action for slander, where justification was pleaded, with general replication and issue. The jury returned a verdict for the plaintiff, but assessed no damages, and afterwards, at a succeeding term, a writ of inquiry of damages was issued, under which damages for the plaintiff to a certain amount were assessed. Counsel for defendant moved in arrest of judgment, on the grounds that no damages were found by the jury which tried the issue, and the writ of inquiry was void. The court awarded a *venire de novo*: *Macnamara v. Brannock*, 4 Har. & McH. 480.

In *Edelen v. Thompson*, 2 Har. & G. 31, it is clear, from the opinion of Judge Earle, that the court would not have sustained the amendment in that case if it had been made after the verdict was recorded. Again, in the more recent case of *Ford v. State*, 12 Md. 546,—a case most carefully considered,—our predecessors have laid it down broadly and emphatically that “if a jury, through mistake or partiality, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it. They cannot, however, be allowed to make alteration after the verdict is recorded”; and this case was reaffirmed in *Williams v. State*, 60 Md. 402. These authorities have, in our judgment, settled it as law in this state that no material alteration can be made by the jury in their verdict, either in a civil or criminal case, after it has been recorded; and if this cannot be done by the jury, *a fortiori* can it not be done by the court or the judge.

It is said, however, that the amount to be recovered, in case the jury should find for the plaintiff, was admitted and agreed upon, and that the jury, as well as the parties, were bound thereby. But we find no such admission made by the pleadings, either directly or inferentially. On the contrary, the pleas of *non assumpsit* and set-off put in issue the amount of recovery, as well as the right of the plaintiff to recover at all; and it was the province and duty of the jury to find this amount by their verdict. Nor is it pretended that any written

agreement on this subject was ever made between counsel. If such written agreement had been made, filed, and entered upon the docket, the case would have presented a different aspect. But no such written agreement was made, and even the oral admission or agreement relied on in the motion to have the jury reassembled was denied by defendant's counsel, who also objected to the reception of the affidavit made by counsel for the plaintiff, in which the same oral admission is set up. It may be that if the jury had been sent to their room to correct this sealed verdict before it was received and recorded they would have inserted the same sum that was afterwards put in it by the judge; but we find nothing in the record which enables us to say with certainty they would have done so, or that such was their real intention. The affidavit of counsel on the subject was wholly inadmissible.

In conclusion, we may say we are firmly convinced that the adoption of any other rule on this subject than that so plainly laid down by our predecessors, and so long adhered to in practice by the courts of the state, would be dangerous in the extreme, would open the door to abuses, and lead to doubtful and possibly pernicious results; and we cannot escape the legal conclusion that by making the amendment complained of in this case the judge has invaded the exclusive province of the jury, and substituted his verdict for theirs.

We are therefore of opinion the learned judge of the court below was in error in overruling the motion in arrest, and shall accordingly reverse the judgment, and remand the case, to the end that a *venire de novo* may issue.

Judgment reversed, and a *venire de novo* awarded.

AMENDMENT OF VERDICTS: See note to *Ross v. Barker*, 14 Am. Dec. 518; *Wood v. McGuire*, 17 Ga. 361; 63 Am. Dec. 246, and note 248.

NALLY v. LONG.

[71 MARYLAND, 585.]

PAROL EVIDENCE OF WARRANTY INADMISSIBLE WHEN. — Where in an action for an alleged breach of warranty of a mortgage sold by the defendant to the plaintiff no fraud or deceit is alleged in the declaration, and the written assignment on the mortgage contains no warranty, evidence that at the time of the execution of the assignment the defendant verbally warranted the mortgage to be a good lien on the property is inadmissible.

ASSUMPSIT. The opinion states the case.

Edward Staks, for the appellant.

H. H. Keady and George W. Smith, for the appellee.

BRYAN, J. Nally sued Long for an alleged breach of warranty. The declaration contained five common counts in *assumpsit*, and a special count. The special count averred that a certain John Reichard held a mortgage on the lands of one Jacob Newman, and that he assigned it to Long: and that in consideration that Nally would purchase the mortgage from Long, he warranted and represented to Nally that it was a good and valid subsisting first lien on the real estate therein mentioned; and that Nally, confiding in the warranty, did purchase the mortgage; but nevertheless it was not a good and valid lien, as warranted. The evidence showed that the mortgage was dated and executed in May, 1864, but not recorded until February, 1868. The assignment from Reichard to Long was written on the mortgage, and dated April, 1874. That to Nally was also written on the mortgage, and was in the following terms:—

“For value received, I hereby assign and transfer the foregoing mortgage and the balance due thereon unto Ezra Nally, of Washington County.

“Witness my hand and seal this 13th day of October, in the year 1877. (Balance being \$751.35, int. from Apl. 1, 1876.)

PETER LONG. [Seal.]

“Witness: F. M. DARBY.”

The plaintiff offered to prove that at the time of the execution of the assignment, the defendant verbally warranted the mortgage to be a good lien on the property. The court rejected the evidence, and the plaintiff excepted. There is no allegation of fraud or deceit in the declaration filed in this case; it proceeds simply for a breach of warranty. The written

assignment contains no warranty, and it must be taken as the authentic evidence of the meaning of the parties: *Dixon v. Clayville*, 44 Md. 578, and numerous other cases.

Judgment affirmed.

IN THE ABSENCE OF FRAUD OR MISTAKE, where a written contract contains all the essentials of a valid contract, and its terms are sufficiently comprehensive to embrace the whole subject-matter of the contract, no oral evidence can be introduced to add to, vary, or contradict it: *Parker v. Merrill*, 98 N. C. 232; *Stoddard v. Nelson*, 17 Or. 417; *Griel v. Loman*, 86 Ala. 132; *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239.

PAROL EVIDENCE IS INADMISSIBLE TO PROVE A WARRANTY not mentioned in a deed of conveyance: *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

KRIDER v. MILNER.

[90 MISSOURI, 145.]

SURVEYOR MAY, FOR PURPOSE OF REFRESHING HIS MEMORY, USE RECORD OF SURVEY made by him, although such survey was not made in accordance with the requirements of the statute. And a copy of such record may be used for that purpose, where it is not objected to as being a copy, and not the original.

POSSESSION OF LAND UP TO DIVISION LINE NOT ADVERSE WHEN. — When adjacent proprietors hold possession up to a dividing fence built for convenience, and without claiming or intending to claim beyond the true line, the possession of the one is not adverse to the other.

AGREEMENT AS TO BOUNDARY IS BINDING WHEN. — Where there is a dispute as to the true division line between adjoining proprietors, or the line is uncertain, and they are ignorant of its true location, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement binds them and those claiming under them. Such an agreement is not within the statute of frauds.

SUPREME COURT CANNOT REVIEW FINDINGS OF FACT WHEN. — The supreme court may determine whether or not there is any evidence to support a given theory, but where there is such evidence, it has no power to review findings of facts made by the court below in actions at law. And whether a case at law is tried by the court alone, or before a jury, the instructions should state hypothetically the facts, so that the supreme court can determine whether or not the court below applied correct principles of law.

EJECTMENT. The opinion states the case.

Thrasher, White, and McCammon, for the appellant.

Goode and Cravens, and T. W. Kersey, for the respondent.

BLACK, J. This is an action of ejectment to recover a strip of land eight rods wide off of the south side of the east half of lot 2 of the northwest fractional quarter of section 4, etc.

Plaintiff owns the east half of lot 2, which contains, according to government survey, 43.06 acres. Defendant owns the east half of lot 1, which contains 40.04 acres. The contest is over the proper location of the boundary line; the plaintiff's land is on the north and the defendant's on the south of this disputed line. For convenience, each tract will be designated as a forty-acre tract.

It appears a fence had been erected between the two forty-acre tracts as far back as 1868 or 1869 by one Autery, who owned the south forty. Mr. Moore, who then owned the north forty, says he supposed the fence was on the line. Mr. Franklin owned the north forty from 1874 to 1879, and during that time, and on to December, 1883, Mr. Hale owned the south forty. Mr. Franklin says he and Hale talked about the line, and Mr. Hale said he thought the true line was in his (Hale's) field; that Hale agreed with him that the line was in his (Hale's) field, and that some time they would have the land surveyed, and place the fence on the true line. Plaintiff purchased and took possession of the north forty in 1879, and it appears he made a new fence, placing it still farther in on his own land, and Hale took the old fence away. The county surveyor says he established the line between plaintiff and Hale, at their request, in 1883, that both parties were present, and that he found the line to be eight rods south of the fence. Subsequently, and in 1883, the defendant, Milner, became the owner of the south forty. This suit was commenced in 1885.

The case was tried by the court without a jury; no instructions were asked by the plaintiff. Mr. Youngblood, the county surveyor, who made the survey in 1883, attempted to make a record of his survey under the provisions of chapter 158 of the Revised Statutes of 1879; and he produced in court a copy of this record, which copy was made and certified by himself. On the objection of defendant, the court, by an instruction, excluded this copy, because it failed to show that the survey was made in accordance with the requirements of the statute; but the copy was evidently used by the surveyor as a memorandum to refresh his memory in giving his evidence as to how he made the survey and where he found the line. The record could have been used for such a purpose; and since there was no objection to the copy because it was a copy, and not the

original, there was no error in allowing it to remain in evidence for that purpose.

That this survey disclosed the true line does not seem to be questioned; and the real contention is, whether, for other reasons, the defendant can hold a part of the land belonging to the plaintiff's forty-acre tract. The principles of law which dispose of this and like cases are not difficult or doubtful. When adjacent proprietors hold possession up to a dividing fence built for convenience, and without claiming or intending to claim beyond the true line, the possession of the one is not adverse to the other: *Kincaid v. Dormey*, 47 Mo. 387; *Walbrunn v. Ballen*, 68 Mo. 165. But where there is a dispute as to the true division line between them, or the line is uncertain, and they are ignorant of its true location, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement is binding on them, and those claiming under them. Such an agreement is not within the statute of frauds: *Jacobs v. Moseley*, 91 Mo. 462; *Schad v. Sharp*, 95 Mo. 578; *Atchison v. Pease*, 96 Mo. 566. Now, in this case, the evidence is all to the effect that the owners of these two parcels of land, down to the purchase of the south forty by defendant in December, 1883, claimed and claimed only to own to the true line, wherever that might be. There was therefore no adverse possession on the part of those through whom the defendant derives title; and the court did not err in refusing to give the instruction asked by the defendant on the statute of limitations; there was no evidence upon which to base it.

It was properly refused for another reason. It simply says "that, on the evidence in this case, the statute of limitations is a bar to this suit." While this court may determine whether there is any evidence to support a given theory, still, where there is such evidence, it has no more power to review the finding of facts made by the court in actions of law than it has to review the finding of facts made by a jury in like cases. Whether a case at law is tried by the court alone, or before a jury, the instructions should state hypothetically the facts, so that we can determine whether the court applied correct principles of law.

There is no evidence in the case showing or tending to show that, prior to the survey made in 1883, there was ever an agreement between the adjacent owners as to what should be deemed and taken as the true line. Those prior owners were

in doubt as to where the true line was, and they left its location to be fixed by a subsequent survey. The matter stood in this way when defendant purchased.

The plaintiff is manifestly the owner of the land for which he sued and recovered a judgment, and that judgment is now affirmed.

DIVISION LINES BETWEEN ADJOINING LAND-OWNERS: See *Jones v. Pashby*, 67 Mich. 459; 11 Am. St. Rep. 589, and cases collected in note 592, 593. Where a boundary line is in dispute between two adjoining owners, and they locate a line, intending it to be permanent, which is acquiesced in for a long time and recognised by permanent improvements, such location is binding upon the parties and those claiming under them, without any formal agreement: *Pickett v. Nelson*, 71 Wis. 542; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612, and note.

THOMPSON v. ISH.

[99 MISSOURI, 180.]

STATEMENTS OF TESTATOR AT, BEFORE, AND AFTER MAKING WILL, WHEN AND FOR WHAT PURPOSES ADMISSIBLE. — When the testamentary capacity of a testator, and the question of undue influence exerted upon him, are in issue, it becomes material to know what were his previous purposes, intentions, and state of mind; and statements made by him at, before, and after the making of the will in question are competent evidence for these purposes. And it is not essential that those statements should be of the *res gestæ*, to render them admissible, though their value as evidence diminishes, of course, in proportion as they are remote from the date of the will.

INSTRUCTION AT CLOSE OF EVIDENCE CURES FAILURE OF COURT TO RESTRICT TESTIMONY TO CERTAIN PURPOSES WHEN. — Where the court fails, at the time when they are offered, to instruct the jury that statements made by a testator before and after the making of his will were only competent for the purpose of showing the state of his mind and affections, but does so instruct them at the close of the evidence, this will be sufficient.

TESTIMONY AS TO CONTENTS OF PRIOR WILL IS ADMISSIBLE for the purpose of showing the fixed purpose and intention of the testator at the time of its execution, when the two wills are substantially the same, and the issues are want of testamentary capacity, and undue influence.

EVIDENCE THAT SOME OF TESTATOR'S CHILDREN WERE IN GOOD CIRCUMSTANCES, AND OTHERS NOT, is admissible, upon a trial to determine the validity of a will, for the purpose of placing the triers as nearly as possible in the position of the testator, and enabling them to consider all of the evidence from his point of view at the time he made the will.

PATIENT MAY WAIVE PROTECTION AFFORDED BY STATUTE AGAINST CALLING PHYSICIAN to give evidence of information acquired in a professional character; and what he may do in his lifetime those who represent him after his death may also do, for the purpose of protecting interests

claimed under him. When, therefore, the dispute is between the devisee and heirs at law of a testator, all claiming under the deceased, either the devisee or heirs may call the testator's attending physician as a witness.

WITNESS MAY BE RECALLED TO LAY FOUNDATION FOR HIS IMPEACHMENT as to statements made by him subsequent to the time when he gave his testimony, although he had been discharged as a witness.

IMPROPER REMARKS OF COURT NOT REVERSIBLE ERROR WHEN. — Remarks made by the court on excluding the testimony of one physician, offered to show the reputation and standing of another physician, before the latter's deposition had been read, that his "character and standing as an eminent physician is part of the history of Missouri, and if the courts and juries take notice of the facts of history, the evidence is immaterial," are improper, and ought not to have been made, but do not constitute reversible error.

TESTAMENTARY CAPACITY CANNOT BE PROVED BY NEIGHBORHOOD RUMORS; and the testimony of a witness that the testatrix was "known to the community as a strong-minded woman" should be excluded. Its improper admission, however, will not call for a reversal, when there has been a great amount of competent testimony to the same effect.

QUALIFICATION OF WITNESS TO GIVE EXPERT TESTIMONY. — It is for the court to determine, in the first instance, whether a witness offered as an expert possesses the proper qualifications; but the value of the testimony he may give is a question for the jury, and depends upon the skill of the witness in his profession, the extent of which may be shown by one who speaks from knowledge.

TESTATOR IS OF SOUND AND DISPOSING MIND when he knows that he is disposing of his property by will, to whom he is giving it, and the general nature and character of the property.

UNDUE INFLUENCE, WHAT IS NOT. — The influence which a child may acquire from association with and attention and acts of kindness to a parent, while he has power to deliberate and estimate the inducements, will not avoid the will of the parent, if the influence is exerted in a fair and reasonable manner, and without fraud or deception. The influence of one occupying such relation to the testator, to avoid the will, must be such as to overreach and destroy the free agency and will power of the testator.

PRIOR REVOKED WILL IS ADMISSIBLE IN EVIDENCE TO SHOW FIXED PURPOSE AND INTENTION OF TESTATOR at that time as to the disposition of his property, whether such will was formal in its execution or not.

ACTION to set aside a will. The opinion states the case.

R. A. De Bolt, and Wallace and Chiles, for the appellants.

J. D. Shewalter, for the respondents.

BLACK, J. This is a suit to set aside the will of Martha Ish, late of Lafayette County. The will bears date April 17, 1883, and she died on the second day of May following, at the advanced age of nearly eighty. She left surviving her three daughters and one son, the defendant James D. Ish, and a

number of grandchildren, who are the children of her four deceased children.

Mrs. Mary Handly, one of the surviving daughters, is not named in the will. To the other children and grandchildren, except James D. Ish, the testatrix gave one dollar each, and to James D. Ish she gave the residue of her estate, consisting of 470 acres of land, of the value of about sixteen thousand dollars, and some personal property of no great value.

Though Mary Handly and some of the grandchildren are made co-defendants with James D. Ish, he is the only real defendant, and will be designated as the defendant. The will is assailed on two grounds: 1. Want of mental capacity on the part of the deceased; and 2. Undue influence exercised by James D. Ish, who is alleged to have been her confidential adviser and agent. There were two mistrials in Lafayette County, when the venue was changed to Ray, and a trial there resulted in a verdict sustaining the will.

The evidence took a wide range on both sides, so that it is out of the question to give more than an outline of it. The husband of Martha Ish died testate in 1869, leaving to her the lands in question, and to the defendant James D. Ish the home place. Martha Ish continued to live with the defendant, on the home place, until she died, in 1883. In April, 1882, she executed a will, whereby she gave her lands, except forty acres, to James D. Ish, and the balance of her property she devised and bequeathed to her children and grandchildren. That will was made in view of a contemplated visit to two of her daughters, Mrs. Rice and Mrs. Handly, who resided in the state of California. She made the visit, returning to this state with her son, the defendant, in November of that year. She is shown to have been a woman of more than ordinary strength of mind and determination, and attended to her property affairs partly herself and partly through the defendant. She became confined to her room in March, 1883, and the will in question was executed on April 17th, as before stated.

Dr. Henderson, who was her physician, and is an attesting witness, testified that she began to give way in March; that she had tumors on her head, one of which she believed to be a cancer, and from which she believed she would die; that she had partial paralysis on one side; that she was a large, fleshy woman, and had to be raised up by others to sign the will, and she made two efforts before she completed her signature;

that her mind was then; and up to the last of the month, good, though she suffered much from the tumors and a pain in her arm. Mr. Rathbun, who prepared both wills, says he took the old one to the house and read it to her, and she said she wanted to change it, and gave him directions as to the changes; that he was in her room from ten to two o'clock, except at dinner-time; that her voice was strong, and he saw no change in her mind; that when the new will was signed, the old one was destroyed; that he took the names of the children from the old will, and no one discovered the omission of the name of Mrs. Handly.

There is much other evidence tending to show that Mrs. Ish was perfectly rational at, before, and after she signed the will, and that it was her own act. On the other hand, Mrs. Handly says her mother was not in a condition to transact any business on March 18th. Mrs. Thompson, one of the plaintiffs, was with her mother from March 20th to April 18th, and again after the will had been executed. She describes the condition of her mother, and her evidence is to the same effect; says she never heard of the will until after the death of her mother.

The evidence of these ladies, and that of some other witnesses, tends to show that the will was the result of solicitation on the part of defendant, and that in the absence of the sisters he controlled her actions. There is evidence tending to show that he induced her to leave California before she had completed her visit; and on the other hand, there is evidence to the effect that he went for her at her own request.

1. The court awarded the opening and closing of the case to defendant. It appears the testatrix, in the month of May, 1882, and just before going to California, went to Lexington, stopped at a hotel, and sent for Mr. Rathbun to prepare her will. He says, after speaking in general terms of the interview, "she said she wanted Don. Ish to have her land, except forty acres, which she might want to use." She talked freely with the landlord, with whom she was acquainted, and consulted him as to the best method of carrying out her intentions. He advised her to make a deed, but she did not adopt the advice. To the admission of these statements the contestants objected.

In the early case of *Gibson v. Gibson*, 24 Mo. 227, the plaintiff offered to prove that the testator said he had never made a will; that if he signed one they got him drunk, and made him sign it. The statements were offered as proof of the facts

stated, namely, that he never made a will, and that if he signed one they made him do it while drunk. The evidence, it was held, was properly excluded when offered for the sole purpose of proving the facts stated; but the court goes on to say that the declarations of the testator are clearly admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections.

The charges here are, that Mrs. Ish did not possess testamentary capacity, and that the will is not her will, but that of the defendant. It becomes material to these issues to know what were her previous purposes, intentions, and the state of her mind; and her statements at, before, and after making the will in question are competent evidence for these purposes: *Rule v. Maupin*, 84 Mo. 587. It is true, those statements were not of the *res gestæ*, but that is not essential to the admission of such evidence. The value of such declarations diminishes, of course, in proportion as they are remote from the date of the act in question. Indeed, the objections to all this evidence concede the competency of these statements for the purposes just stated. The court did not, however, so state at the time the evidence was admitted; but, by an instruction given at the close of the evidence, told the jury that they could only consider the statements made by Mrs. Ish before and after the date of the will in question, as showing the state of her mind and of her affections. This was sufficient.

2. Nor did the court err in allowing the witness Rathbun to testify as to the contents of the will of April, 1882. That will, it is true, had been revoked by the execution of the new and the destruction of the old one. The evidence was not, however, offered for the purpose of establishing it as the will of Mrs. Ish. It was offered for the purpose of showing her fixed purpose and intention at that date. It differs from the one in question only in this, that by the first she gave to her children and grandchildren, other than James, sums amounting in all to about three hundred dollars, and by that will they were made residuary devisees; so that, by it, they would have received the forty acres of land and some three hundred dollars, instead of one dollar each. By both wills she gave the bulk of the property to James, and they are substantially the same. If, as we have seen, the declarations of the testator are admissible when the issues are want of testamentary capacity and undue influence, then it must be competent to

put in evidence, for like purposes, this former will. It tends to show that, for a year before making the will in question, she had formed the purpose of giving the bulk of her property to the defendant. The fact that she had formed that purpose at that date tends to show that the present will was not the result of undue influence exercised by defendant in her last sickness, and when she had become weaker in body and probably in mind. Says Redfield: "Evidence of former wills and of other pecuniary arrangements for the wife is also admissible, as having a bearing upon the question whether the testator has understandingly and of his own free will changed his settled views": 1 Redfield on Wills, 4th ed., *538. The law allows a wide range of testimony on the issues of undue influence and weakness of mind, and it seems former wills may be introduced to show undue influence; and on the other hand, they may be introduced to show the previous purpose of the testator in regard to the disposition of his property, and thus shed some light on the question whether the contested will was the testator's own free act: 1 Redfield on Wills, 4th ed., *537; *Love v. Johnston*, 12 Ired. 358; *Hughes v. Hughes*, 31 Ala. 520.

3. During the trial, defendants introduced some evidence, over the objections of plaintiffs, to the effect that Mrs. Rice and Mrs. Thompson were well provided for, by reason of the fact that their husbands were large property owners, the one residing in the state of California, and the other in this state. In considering this objection, it is to be remembered that plaintiffs, in their cross-examination of James D. Ish, drew out the fact that he was in debt, and his property heavily encumbered. Mrs. Ish had been living with him for about fourteen years, and became attached to his wife, who appears to have treated the old lady with kindness and affection. It is not unreasonable to believe that the testatrix, in making a disposition of her property, would take into consideration the fact that some of her children were in good circumstances, and that others were not. If such considerations would naturally have some influence upon her mind, it is difficult to see why they may not be put in evidence, keeping within reasonable bounds. The triers of the facts should be placed in the position of the testatrix, as near as possible, so as to be able to consider all the evidence from her point of view when she made the will in dispute. We conclude there was no error in the admission of this evidence.

4. A far more difficult question arises over the deposition of Dr. Joseph Wood, which was read in evidence by defendant. Dr. Wood was called in to consult with Dr. Henderson three or four days after the will in question had been executed. He says: "I remained at her residence all night, and had two good long conversations with her on the subject of her disease. She gave me a very satisfactory description of her disease." Being then asked his opinion as to the condition of her mind, he says: "I believe and am of the opinion that Mrs. Ish was perfectly sound in her mind at the time I had the conversations with her." This and other portions of the deposition were objected to, on the ground that Dr. Wood was, under the statute, an incompetent witness, and could not disclose the matters testified to by him.

Section 4017 of the Revised Statutes of 1879 provides: "The following persons shall be incompetent to testify: . . . 5. A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." This statute is very emphatic, and it places the seal of secrecy upon information acquired by observation, as well as that acquired by oral communication: *Gartside v. Conn. etc. Ins. Co.*, 76 Mo. 446; 43 Am. Rep. 765. There can be no doubt but the information upon which Dr. Wood based his opinion was acquired from the testatrix while attending her in a professional character, and the information was necessary to enable him to give her and her attending physician advice concerning her disease. The opinion which he expresses is based upon the information thus acquired. The physician being prohibited from disclosing the information, he certainly cannot give an opinion based upon his knowledge thus acquired. He is no more at liberty to give an opinion upon such knowledge than he is to detail the facts revealed to him by the patient.

The protection afforded by the statute may, however, be waived by the patient, and he does waive it by calling a physician to give evidence of information acquired in a professional character: *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358; *Carrington v. City of St. Louis*, 89 Mo. 212; 58 Am. Rep. 108; *Blair v. Chicago etc. R. R. Co.*, 89 Mo. 337. In the first of these cases, the widow brought suit to recover damages for injuries received by her husband, and from which injuries he

died. It was there said: "Where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible. Where it is offered by the opposite party, the physician cannot testify, against the objection of the patient or his representatives." And accordingly it was ruled that the physician should have been allowed to testify when offered by the widow.

The Michigan statute is in substance and effect the same as our statute: Comp. Laws 1871, sec. 5943. In *Fraser v. Jenkinson*, 42 Mich. 209, a will dated in May, 1877, was contested on various grounds, and, among them, unsoundness of mind and undue influence. The proponents of the will, who were special administrators appointed by the probate court, proved by a physician that he had been employed by the testator in a professional capacity from September, 1876, and the physician was then allowed to testify that the mind of the deceased was sound, and to describe the particulars of the disease. Cooley, J., after quoting the statute, and saying the trial court did not err, uses this language: "This statute, as we have held, covers information acquired by observation while the physician is in attendance upon his patient, as well as communications made by the patient to him; but the rule it establishes is one of privilege for the protection of the patient; and he may waive it if he sees fit: *Scripps v. Foster*, 41 Mich. 742; and what he may do in his lifetime those who represent him after his death may also do, for the protection of the interests they claim under him."

On the other hand, a different ruling prevails in the states of New York and Indiana. Section 833 of the New York code (Throop's Annotated Code) relates to ministers, section 835 to attorneys, and section 834 provides that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." And section 836 provides that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or client." It seems to have been the practice in the surrogate's court to admit the evidence of the attending physician of the testator in the probate of wills: *Allen v. Public Adm'r*, 1 Bradf. 221; *Whelpley v. Loder*, 1 Demarest, 368. But in *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1, which was an action

by an executor on a policy of insurance, it was held by the court of appeals that the executor could not waive the privilege of the statute, and the argument goes to the extent, we think, of holding that no one but the patient himself can make the waiver. *Renihan v. Dennin*, 103 N. Y. 577, 57 Am. Rep. 770, was a case tried on an appeal from the judgment of a surrogate court admitting a will to probate, and it was held that the attending physician of the deceased was not a competent witness. This ruling was followed in contested will proceedings in the subsequent cases of *In re Coleman*, 111 N. Y. 220, and *Loder v. Whelpley*, 111 N. Y. 239. The Indiana statute is not essentially different from the statute of this state; and in *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, the court followed the rule of the court of appeals of New York in a testamentary case.

The statutes of this state and those of New York prohibit the physician from disclosing the information acquired under the circumstances specified; but the New York statute goes further, and says the prohibition shall apply to every examination of the designated persons, a physician being one of them, unless "expressly waived by the patient." It not only creates the privilege, but defines by whom it may be waived, and says the waiver must be express. Our statute contains no such qualification. The difference in the statutes may fairly lead to different results.

Notwithstanding our statute provides for no exception, still it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient; and we have held that it may be waived by the representative, and in this our ruling accords with that of the supreme court of Michigan under a like statute. If the patient may waive this right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be done by those who represent him after his death, for the purpose of protecting rights acquired under him.

Some light may be thrown upon this question by analogy from the rules of law applied to confidential communications between client and attorney. Such communications, it is held in *Russell v. Jackson*, 9 Hare, 390, must not be revealed in cases where the rights and interests of a client, or those claiming under him, come in conflict with the rights and interests of third persons; but this rule, it is held, does not apply to cases of testamentary disposition of property by the

client. The disclosure in such cases, it is considered, can affect no right or interest of the client, and is therefore not within the reason of the rule. Taylor says: "In stating that the privilege does not terminate with the death of the client, care must be taken to distinguish between cases where disputes arise between the client's representative and strangers, and those in which both of the litigating parties claim under the client." As to the latter class of cases he says: "It would be obviously unjust to determine that the privilege should belong to one claimant rather than the other": 1 Taylor on Evidence, sec. 928, p. 780. See also *Blackburn v. Crawfords*, 3 Wall. 175; *Scott v. Harris*, 113 Ill. 454.

It is difficult to see why the rule of exclusion should apply in case of a physician, and not of an attorney. An attorney is declared, by the third clause of section 4017 of our statutes, to be incompetent to testify concerning communications made to him "without the consent of the client." The clause in relation to physicians does not contain this quoted qualification; but the third clause is simply declaratory of the common law; and if the difference between the clauses argues anything, it should be that the physician cannot testify with or without the consent of the patient. Whatever may have been the rule at common law, the statute places attorneys and physicians on substantially the same ground. We conclude, as before, that, when the dispute is between the devisee and heirs at law, all claiming under the deceased, either the devisee or heirs may call the attending physician as a witness.

5. The plaintiffs, in putting in their evidence, called and examined Sawney Brown (colored). Nearly, if not quite, a week thereafter, and when the defendant produced evidence in rebuttal, he called the witness Brown, and asked him if he did not, at a designated time, and in the presence of named persons, say he knew nothing about the case, and only swore to what Joe Lightner told him to swear. The witness denied making the statement, and the named persons were called and testified that he did make it. The objections made to all this evidence are, that Brown had been discharged as a witness, and that the question asked to lay a foundation to impeach him related to a date subsequent to that at which he had testified. In the first place, there is nothing to show that the witness Brown had been discharged, and if he had, it can make no difference. The law is not so lame that a witness can admit that he has testified to matters of which he knew

nothing, and it then be out of the power of the opposite party to impeach him. It would have been error for the court to have ruled otherwise than it did. The argument is made that this witness was entrapped into foolish talk by a friend of the defendant, but the argument addresses itself to the jury, and not to this court. The witness made a full and lengthy explanation, and the question of his veracity was one for the jury to determine.

6. The defendant attempted to show the reputation and standing of Dr. Wood, whose deposition had not yet been read, as a physician and surgeon, by another physician. The judge excluded the evidence, but remarked from the bench: "Dr. Wood's character and standing as an eminent physician is part of the history of Missouri, and if the courts and juries take notice of facts of history, the evidence is immaterial." These remarks of the judge were improper, and should not have been made, but do not constitute reversible error.

7. The witness Rathbun testified: "Mrs. Ish was known to the community as a strong-minded woman." This evidence ought to have been excluded, and why it was drawn out we cannot conjecture. Testamentary capacity cannot be proved by neighborhood rumors: *Brinkman v. Rueggessick*, 71 Mo. 553. As the evidence is reported, we do not understand the witness to speak of the date of the last sickness of Mrs. Ish, but of a prior date. In view of the vast amount of competent evidence to the same effect, we do not see how this statement of the witness could have prejudiced the plaintiffs. The judgment should not be reversed for this error.

8. Dr. Henderson, who testified in behalf of defendants, both as a physician and a subscribing witness, stated on cross-examination that he had no diploma, and did not graduate at a medical college, but had a certificate as a registered physician, and attended a private medical school, but did not graduate. Later in the case, the defendant called Dr. Alexander, who said he knew Dr. Henderson, and being asked his opinion of the qualifications of Dr. Henderson as a physician, said: "I regard him as above the average of doctors in Missouri." It is, of course, for the court to determine, in the first instance, whether a witness who is offered as an expert possesses the proper qualifications, but the value of the evidence which the witness may give is a question for the jury; and as that value must depend much upon the skill of the witness in his craft or profession, we can see no serious ob-

jection to the admission of evidence which goes to show the extent of his skill. Dr. Alexander knew Dr. Henderson, and it is from that knowledge, and from that alone, he speaks, and this he could do: *Laros v. Commonwealth*, 84 Pa. St. 200.

9. Twelve instructions were given at the request of the defendant, and nineteen at the request of plaintiffs, one of them having been modified by the court. On the question of capacity to make a will, the court, at the request of defendant, in substance, directed the jury that a person of sound mind, above the age of eighteen years, has the right to dispose of his or her property to any person, and to leave others unprovided for; that neither old age, sickness, feebleness, or bodily infirmity, or mere weakness of mind, incapacitates the making of a will; "that soundness of mind means the ability to know and comprehend that one is disposing of his property by will, the general value and character of the property, and to whom the same is being given. And if, therefore, the jury believe, from the evidence, that Martha Ish signed the paper read in evidence as her will, . . . that at the time she had sufficient mind and memory to know that she was disposing of her property by will, to whom she was giving it, and the general nature and character of the property, then she was of sound mind; and unless procured by undue influence, as afterwards defined, you will find said paper to be her will, even though the jury may believe, from the evidence, she was old, infirm, sick, and feeble, and nigh unto death, at the time she signed, and for these or other causes her mind was not as vigorous and strong as it had once been, and her body was weak and feeble."

The fifth instruction for plaintiffs is in these words: "5. The jury are instructed that, to constitute a sound and disposing mind and memory in said Martha Ish, . . . it was not only necessary that she should have then been capable of comprehending the nature and extent of her property, and the persons who [were] intended to be provided for by the will, but she must also have been able to dispose of her property with understanding and reason, and it is not sufficient that she was then merely capable of understanding what she was engaged in."

The instructions for the defendant do not, as seems to be supposed, withdraw from the consideration of the jury the circumstances of old age, weakness of body, and a want of a vigorous mind. They simply assert that if she possessed a

disposing mind, these circumstances alone did not disable her from making a will. Other instructions for the plaintiffs left it to the jury to take all these facts in evidence into consideration, including the fact that she gave all her property to defendant. These definitions and description of a sound mind, namely, the ability on the part of the testatrix to know that she was disposing of her property by will, and to whom she was giving it, and the general nature and character of her property, come up to the standard of a sound and disposing mind repeatedly asserted by this court: *Brinkman v. Rueggeseick*, 71 Mo. 556; *Appleby v. Brock*, 76 Mo. 314; *Jackson v. Hardin*, 83 Mo. 178; *Myers v. Hauger*, 98 Mo. 433.

10. For the defendant, the court gave this instruction upon the subject of undue influence: "If the jury believe, from the evidence, that said paper was dictated by Mrs. Ish, that it expresses her directions, and embraces such bequests and devises as she then desired to make, then the jury are instructed the same was not procured by undue influence; and if . . . she had the mental capacity to make a will, as elsewhere defined, you will find said paper to be her will, even though you may believe, from the evidence, that, from association, kindness, or other reasons, James D. Ish had an influence with his mother, and at times looked after and transacted some of her business."

And at the request of the plaintiff, the court gave the following instruction: "11. If the jury believe, from the evidence, that the mind of deceased, Martha Ish, either from sickness, disease, age, bodily and mental decay, and overweening confidence, was subject to the dominion and control of her said son, James D. Ish, and that he exercised such power and influence over her mind and will, in the disposition of her property by such will, as to destroy her liberty and free agency, and to cause such disposition of her property to be made as to suit the purposes and wishes of defendant James D. Ish, and not her own, then such will in law is not the will of said Martha Ish, and the jury will find the issue submitted to them for the plaintiffs, and against such will."

Other instructions were given, at the request of contestants, reciting the various circumstances in evidence, and informing the jury, if they were true, they should be considered in determining the question of undue influence, and were facts from which undue influence might be inferred. They are, in their scope, such instructions as, it was said, should have been

given in the case of *Harvey v. Sullens*, 46 Mo. 147; 2 Am. Rep. 491.

The influence which a child may acquire from association with and attention and acts of kindness to a parent will not invalidate a will. The influence of a wife or child upon a testator, while he has power to deliberate and estimate the inducements, will not avoid the will, if the influence is exerted in a fair and reasonable manner, and without fraud or deception. The influence of one occupying such relation to the testator, to avoid the will, must be such as to overreach and destroy the free agency and will power of the testator: *Brinkman v. Rueggessick*, 71 Mo. 556; *Jackson v. Hardin*, 83 Mo. 78; *Myers v. Hauger*, 98 Mo. 433. The instructions given upon the subject of undue influence are favorable to the contestants.

11. The twentieth instruction, to the effect that the will of 1882 could not be considered unless it was signed by Martha Ish in the presence of two witnesses, who signed the same at her request, and not the request of her attorney, was properly refused. That will was offered for the sole purpose of showing her then fixed purpose and intention as to the disposition of her property, and it is immaterial whether it was formal in its execution or not. Besides, the evidence is all to the effect that it was formally executed.

From the numerous questions raised in the briefs, we have selected and disposed of those which we think call for special notice. No substantial reason is shown why the judgment should not stand, and it is therefore affirmed.

PHYSICIAN, WHEN MAY AND WHEN MAY NOT TESTIFY. — At common law, a physician, when called upon to testify as a witness, had no right to decline or refuse to disclose any information on the ground that such information had been communicated to him confidentially in the course of his attendance upon or treatment of his patient in a professional capacity. The physician was entitled to no such privilege: *Duchess of Kingston's Case*, 1 How. St. Tr. 643; *Rez v. Gibbons*, 1 Car. & P. 97; *Broad v. Pitt*, 3 Car. & P. 518; 1 Taylor on Evidence, sec. 916; 1 Greenl. Ev., sec. 248; 1 Wharton on Evidence, sec. 806. This condition of the law was deplored by distinguished judges in England a long time ago. In *Wilson v. Rastall*, 4 Term Rep. 753, 760, Lord Kenyon, C. J., said: "There are cases to which it is much to be lamented that the law of privilege is not extended, — those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters." And Lord Brougham, in *Greenough v. Gaskell*, 1 Mylne & K. 98, 103, referring to the privilege of attorneys in respect to confidential communications made to them by their clients, said: "Certainly, it may not be very easy to discover why a like privilege has

been refused to others, and especially to medical advisers." And in many of the states of the Union, statutes similar in substance and effect to the statute quoted in the opinion in the principal case have been enacted. No such statute seems to have been yet enacted in the state of Texas: *Stengold v. State*, 22 Tex. App. 464. The object of these statutes seems to be to place communications made to physicians in the course of their professional employment upon the same footing with communications made by clients to their attorneys in the course of their employment: *Edington v. Mutual L. I. Co.*, 5 Hun, 1; *Masonic Mutual B. Ass'n v. Beck*, 77 Ind. 203; 40 Am. Rep. 295. Under the provisions of those statutes, a physician cannot be permitted to give in evidence in a court of justice any information necessarily acquired by him in the discharge of his professional duties, to the prejudice of his patient or of the latter's representative: *Excelsior Mut. Ass'n v. Bidde*, 91 Ind. 84; *Johnson v. Johnson*, 14 Wend. 637.

A physician or surgeon will not be permitted to testify to facts necessary to enable him to prescribe for his patient, and which were communicated to him for the purpose of enabling him to perform his professional duty: *Connecticut M. L. I. Co. v. Union Trust Co.*, 112 U. S. 250; *Briggs v. Briggs*, 20 Mich. 34; *Norton v. City of Moberly*, 18 Mo. App. 457; *Johnson v. Johnson*, 4 Paige, 460; *Sloane v. New York Central R. R. Co.*, 45 N. Y. 125; *Dilleber v. Home L. I. Co.*, 69 N. Y. 256; 25 Am. Rep. 182; *Cohen v. Continental L. I. Co.*, 41 N. Y. Super. Ct. 296. And a physician who attends a sick person in consultation with the patient's regular physician comes within this rule: *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770.

The physician is prohibited from disclosing information acquired by him in any way during his attendance upon his patient in his professional character, and necessary to enable him to prescribe for the latter, whether such information be received by direct communication from the patient himself, or be acquired by the physician through his own observation or examination: *Rapalje's Law of Witnesses*, sec. 272; *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Williams v. Johnson*, 112 Ind. 273; *Houston v. Simpson*, 115 Ind. 72; 7 Am. St. Rep. 409; *Briggs v. Briggs*, 20 Mich. 34; *Gartside v. Connecticut M. L. I. Co.*, 76 Mo. 446; 43 Am. Rep. 765; *Lins v. Massachusetts M. L. I. Co.*, 8 Mo. App. 363; *Streeter v. City of Breckenridge*, 23 Mo. App. 244; *Corbett v. St. Louis etc. R'y Co.*, 26 Mo. App. 621; *Edington v. Mutual L. I. Co.*, 67 N. Y. 185; *Grattan v. Metropolitan L. I. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; *Grattan v. Metropolitan L. I. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Edington v. Mutual L. I. Co.*, 5 Hun, 1; *Daragh's Will*, 52 Hun, 591. In the case last cited it was said that the intention of the statute is to protect all communications made by a patient to her physician which she supposed or had reason to suppose were protected by the provisions of the law. In delivering the opinion of the court in *Gartside v. Connecticut M. L. I. Co.*, 76 Mo. 446, 43 Am. Rep. 765, Norton, J., said: "Information acquired by a physician from inspection, examination, or observation of the person of the patient, after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient." And Miller, J., in delivering the opinion of the court in *Edington v. Mutual L. I. Co.*, 67 N. Y. 194, said: "The statute in question, being remedial, should receive a liberal interpretation, and not be restricted by any technical rule. When it speaks of information, it means not only communications received from the lips of the patient, but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the

time, or from observation of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute." And in that case it was held that an offer of evidence was properly excluded, although the testimony was expressly limited to what the witness knew from his attendance upon the patient as his physician, independent of any information given or statements made by the patient.

The statutes of the various states regarding the disqualification of physicians to testify do not make such qualifications general, but limit it to information acquired by them in attending patients in a professional capacity, and necessary to enable them to prescribe for their patients or to otherwise discharge their professional duties. These statutes have, so far as we can ascertain, been rather strictly construed than otherwise, and physicians have been compelled to testify in all cases where the communication was made to them unnecessarily, and was not for the purpose of enabling them to perform their duties to their patients. Thus, perhaps, the first case construing the statute was that of *Hewitt v. Prime*, 21 Wend. 79, in which it was determined that a physician consulted for the purpose of procuring an abortion must testify, "because the information given him is not essential to enable him to prescribe for a patient."

In Michigan, a plaintiff, suing for damages for personal injuries, which he claimed had been inflicted on him by the defendant, having made a statement to a physician showing that those injuries, or some of them, existed prior to the alleged violence of the defendant, it was held that the trial court erred in declining to compel the physician to testify, it not appearing by the record that it was necessary information to enable the physician to prescribe: *Campas v. North*, 39 Mich. 606; 33 Am. Rep. 433. So in Arkansas, it has been determined that a physician attending a woman in confinement may testify that she told him that she was not married. In this case, however, the opinion of the court may be regarded as a *dictum*, because the confessions made to the physician were also made to several other persons who were permitted to testify concerning them, and the appellate court was therefore of the opinion that the action of the trial court, including the testimony of the physician, had not been prejudicial to the plaintiff, and therefore did not entitle him to a reversal: *Collins v. Mach*, 31 Ark. 494. In *Hoyt v. Hoyt*, 112 N. Y. 493, the court of appeals of New York determined that a physician who had attended a testator should be compelled to testify to interviews with the latter concerning the condition of his daughter. The surrogate court of the county of New York has also determined that a physician should be directed to testify concerning declarations of a testator in regard to the making of a will, and the physician's advice to him on that subject: *In re O'Neill*, 28 N. Y. 242; 7 N. Y. Super. Ct. 197.

In construing the statute of New York on this subject, the court of appeals said: "Before information can be excluded under this statute, it must appear that it was such as the physician acquired in some way while professionally attending a patient; and it must also be such as was necessary to enable him to prescribe as a physician, or to do some act as a surgeon. It is not sufficient, to authorize the exclusion, that the physician acquired the information while attending his patient; but it must be the necessary information mentioned. If the physician has acquired any information which was not necessary to enable him to prescribe, or to act as a surgeon, such information

he can be compelled to disclose, although he acquired it while attending the patient; and before the exclusion is authorized, the facts must in some way appear upon which such exclusion can be justified: *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 569.

Wooda, J., in *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295, referring to this opinion, said: "But the language of the opinion in that case, upon which stress is laid, does not express the opinion of the court, but only of the judge who wrote it, the other judges concurring in the result only." And Earl, J., himself, in delivering the opinion of the court in the recent case of *Renihan v. Dennis*, 103 N. Y. 573, 57 Am. Rep. 770, said: "It is also claimed that the statute should be so construed as only to prohibit the disclosures by a physician of any information of a confidential nature obtained by him from his patient while attending him in a professional capacity. Such was the view of the statute taken by me in my opinion in *Edington v. Aetna L. I. Co.*, 77 N. Y. 564; but my brethren were then unwilling to concur with me in that view. When the same question again came before the court, in *Grattan v. Metropolitan L. I. Co.*, 80 N. Y. 281, 38 Am. Rep. 617, I again attempted to enforce the same view upon my brethren, and again failed, and it was then distinctly held that the statute could not be confined to information of a confidential nature, and that the court was bound to follow and give effect to the plain language, without interpolating the broad exception contended for."

These remarks, considered independently of the circumstances in which they were uttered and the cases to which they were applied, justify the inference that all information acquired by a physician, no matter how irrelevant to the performance of his duties, must be kept secret by him, and that he will not be required nor permitted to divulge it as a witness. In the case referred to above, from 77 Indiana, the statute under consideration was very general in its terms, and declared physicians were not competent witnesses "as to matters confided to them in the course of their profession, unless with the consent of the party making such confidential communication." But the subject of contention before the court was, whether the physician could be required to disclose facts learned by him from his examination and observation of his patient, made in the performance of his duty in treating such patient for ailments from which he was then suffering; and the court very properly held that what he learned from observation and examination was protected to the same extent as if it had been communicated by his patient in words. The cases in 103 New York and 80 New York, cited above, involved similar questions, and are authority for nothing, except that a physician may not testify to the appearance or condition of a patient, where his opinion was formed or his information acquired while he was attending such patient professionally, and they do not at all conflict with the statement made in other cases, that such information acquired by a physician, and not necessary, nor by him represented to his patient to be necessary, to enable him to discharge his professional functions, is not privileged. Whenever it is apparent that an admission or a declaration was made or information given by the patient to his physician, he may testify as to such declaration, admission, or information, if it was not necessary to enable him to prescribe as a physician or act as a surgeon: *Collins v. Mack*, 31 Ark. 684; *Valensin v. Valensin*, 73 Cal. 106; *Campau v. North*, 39 Mich. 606; 33 Am. Rep. 433; *Scripps v. Foster*, 41 Mich. 742; *Kendall v. Gray*, 2 Hilt. 300; *Staunton v. Parker*, 19 Hun, 55; *Brown v. Rome etc. R. R. Co.*, 45 Hun, 439; *Will of O'Neil*, 26 N. Y. St. Rep. 242. And to exclude a physician from testifying, it must appear that the infor-

mation was acquired while he was being consulted professionally to obtain medical assistance: *Babcock v. People*, 15 Hun, 347. But in *People v. Brower*, 53 Hun, 217, the defendant, after having attempted to commit an abortion on a woman, ran for a doctor to attend her, and while in the physician's office told him what he had done, in order that he might be able to act for her promptly upon their arrival at her residence; and it was held that the communication was privileged. So in *Guptill v. Verback*, 58 Iowa, 98, which was an action for breach of promise of marriage, a physician, sworn as a witness, was asked if the plaintiff had consulted him in respect to getting rid of a child with which she was pregnant at the time, and it was held, there being no showing of an unlawful purpose, that the communication was privileged. The decision of the court was here placed on the ground that it might have been necessary to produce a miscarriage to save plaintiff's life, and that she had the right to consult a physician, and to have her disclosures protected as privileged until her purpose was shown to be unlawful. A physician may be compelled to testify as to the result of a *post-mortem* examination made by him: *Summers v. State*, 5 Tex. App. 365.

STATUTE APPLIES IN PROBATE PROCEEDINGS. — In the case of *Allen v. Public Administrator*, 1 Bradf. 221, 224, the surrogate said: "I do not, in the first place, think that testamentary cases are within the reason or the intention of the statute in question." See also *Whelpley v. Loder*, 1 Demarest, 368. This doctrine has, however, been expressly denied by the court of appeals in several cases, and it is now well settled by the great weight of authority that the statute does apply in probate proceedings, that death does not remove the seal of secrecy from disclosures made by a patient to his physician, and that an attending physician may not, in an action to set aside a will, testify against objection as to the mental and physical condition of the testator, nor divulge, in such action, any information acquired by him while in the discharge of his professional duty: *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203; 40 Am. Rep. 296; *Pennsylvania L. I. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Heuston v. Simpson*, 115 Ind. 62; 7 Am. St. Rep. 409; *Fraser v. Jennison*, 42 Mich. 206; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358; *Westover v. Aetna L. I. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Renihan v. Dennis*, 103 N. Y. 573; 57 Am. Rep. 770; *Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239. Earl, J., in delivering the opinion of the court in *Westover v. Aetna L. I. Co.*, 99 N. Y. 59, said: "The purpose of the law would be thwarted, and the policy intended to be promoted thereby would be defeated, if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one, unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave, the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator."

WAIVER OF PRIVILEGE. — The object of the statute is not to absolutely disqualify the physician from testifying, but to enable the patient to secure medical aid without betrayal of confidence. The patient may therefore waive objection, and permit the physician to testify; and his calling the physician to

testify is a waiver: *Morris v. Morris*, 119 Ind. 341; *Pennsylvania M. L. I. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Grand Rapids & I. R. R. Co. v. Martin*, 41 Mich. 667; *Carrington v. City of St. Louis*, 89 Mo. 209; *Blair v. Chicago & A. R. R. Co.*, 89 Mo. 334; *Territory v. Corbett*, 3 Mont. 50; *Allen v. Public Administrator*, 1 Bradf. 221. But including the statements in the preliminary proofs in an insurance case is not a waiver: *Dreier v. Continental L. I. Co.*, 24 Fed. Rep. 670. Nor is the presence of third parties a waiver, whenever their presence is in aid of the sick person, because then it does not appear that the declarations made before them evince that the patient was willing to renounce the secrecy secured by the statute: *Cohen v. Continental L. I. Co.*, 41 N. Y. Super. Ct. 296. The privilege must, however, be claimed, and the proposed evidence objected to. If this is not done, the objection will be deemed to be waived, and the evidence will not be stricken out: *Hoyt v. Hoyt*, 112 N. Y. 493. And where the privilege of the statute has been waived by the patient, and the waiver has been acted upon, it cannot be recalled, and the patient is not privileged to forbid the repetition of the testimony on a second trial of the case: *McKinney v. Grand St. etc. R. R. Co.*, 104 N. Y. 352.

WHO MAY WAIVE PRIVILEGE. — It is settled by the recent New York decisions that, under the statutes of that state, the only person who can waive the prohibition is the patient himself, from whom the physician acquired the information, and that after his death the prohibition cannot be waived by anyone: *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Renihan v. Dennis*, 103 N. Y. 573; 57 Am. Rep. 770; *Loder v. Whippley*, 111 N. Y. 239. In the case of *Renihan v. Dennis*, 103 N. Y. 573, 57 Am. Rep. 770, Earl, J., who delivered the opinion of the court, said: "It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator, it will exclude evidence of physicians, which is generally the most important and decisive. In actions upon policies of life insurance, where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence which is absolutely needed for the ends of justice. But the remedy is with the legislature, and not with the courts." In other states it is held that the personal representative of the deceased patient may, for the protection of the interests claimed under him, waive the prohibition of the statute: *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Pennsylvania M. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Morris v. Morris*, 119 Ind. 341; *Fraser v. Jennison*, 42 Mich. 206; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358. See also *Staunton v. Parker*, 19 Hun, 55. In *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358, Ewing, C., delivering the opinion, said: "Where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible. Where it is offered by the opposite party, the physician cannot testify, against the objection of the patient or his representatives."

CRIMINAL CASES, STATUTE APPLICABLE IN. — In New York it has been held that the statute applies to criminal cases: *People v. Stout*, 3 Park. Cr. 670; *People v. Murphy*, 101 N. Y. 126; 54 Am. Rep. 661; *People v. Brower*, 53 Hun, 217. In *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661, which was a prosecution for abortion, the physician, who, after the commission of the crime, was selected by the public prosecutor to attend and examine the woman, and who did attend and examine her with her consent, was allowed to testify, as a witness for the prosecution, to his opinion, founded on his observation of the woman, and her narration of the circumstances, that an abortion had been committed. The woman was alive at the

time of the trial. It was held that the disclosure made by the woman was prohibited by the statute, and that the exception to the disclosure by the physician of what he had learned while in professional attendance upon her was well taken. In *People v. Brower*, 53 Hun, 217, the defendant, when he went to call a physician to attend the woman upon whom he had just attempted to produce an abortion, communicated to the physician the fact of what he had done, in order that the physician might bring with him to the woman's residence the means of alleviating her distress; and it was held that this communication was privileged. But in *Hewitt v. Prime*, 21 Wend. 79, it was held that a physician consulted by the defendant as to the means of producing an abortion is not privileged from testifying. And in *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, it was held that on a trial for murder, by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, and to the statements of the deceased during such examination, while attending him in his last illness. Finch, J., referring to this case, said in *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661: "But in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient, and where the latter was dead, so that an express waiver of the privilege had become impossible."

In order to prohibit a physician from testifying in a criminal case, it must appear that he sustained to the prisoner the relation of physician: *People v. Schuyler*, 106 N. Y. 298. In that case, the court queried whether the statute renders a physician incompetent to testify that his patient was free from disease of any kind, and also whether, when a patient calls his physician as a witness to testify as to his mental condition, he does not waive his privilege under the statute, and throw open the inquiry.

The provision in the California code is expressly limited to civil actions: Cal. Code Civ. Proc., sec. 1881, subd. 4.

EX PARTE GOANS.

[99 MISSOURI, 193.]

ALL PERSONS HAVE CONSTITUTIONAL RIGHT TO BAIL BY SUFFICIENT SURETIES, except for capital offenses, when the proof is evident or the presumption great.

INDICTMENT FOR CAPITAL OFFENSE FURNISHES STRONG PRESUMPTION OF GUILT, and this presumption must be applied in all cases on application for bail, and there must be other facts and circumstances which overcome this presumption before the prisoner can be bailed. One or even two mistrials will not furnish the accused the absolute right to give bail.

PRISONER MAY BE ADMITTED TO BAIL WHEN. — Where there has been one mistrial of a prisoner on a capital charge, under circumstances favorable to the prosecution, and his conduct prior and subsequent to the trial shows to the satisfaction of the court that he has not and never has had any thought of evading trial, and the evidence taken on such trial is conflicting as to his guilt, he may be admitted to bail upon furnishing sufficient security.

HABEAS CORPUS. The opinion states the case.

D. E. Wray, John A. Blevins, and J. D. Bohling, for the petitioner.

A. L. Ross, prosecuting attorney, contra.

BLACK, J. Goans, the petitioner, is under indictment in the Morgan circuit court for murder in the first degree, for killing Frank Wilson on August 28, 1887. The stipulation between counsel for the accused and the prosecuting attorney shows that the accused gave himself up immediately after the homicide; that the coroner's jury found that he killed Wilson in self-defense; that a preliminary examination was held on a charge of murder, preferred by the prosecuting attorney, and the accused was discharged by the justice; that two terms of the circuit court intervened before the finding of the indictment, at each of which a grand jury was duly impaneled; and that there was a mistrial in August, 1889, since which time he has been confined in the Cole County jail.

The evidence adduced on the trial, a full transcript of which is before us, shows that Goans and Wilson resided in a country district, at a distance from each other of about four hundred yards. Each had a family consisting of a wife and a number of children. There is a small inclosed field on Goans's premises, and a road running south from Wilson's house to and around the east side of the field, and thence in a westerly direction to a spring on Goans's premises, which is close to his cabin. In the forenoon of the day of the homicide, the children of the two families got into some trouble at the house of the accused, he and his wife being then at a neighbor's house. Wilson's children ran home, and in a short time Wilson went to the house of the accused, flourishing a pistol, and threatening to kill the children. They ran to the neighbor's house, and informed the accused. He went home and discharged an old load from his shot-gun, and reloaded it. After noontime, Wilson's children came to the spring for water, and the accused notified them that they could get no more water from the spring. They returned home, and the deceased, in a great rage, got a pail and a pistol, and started toward Goans's house. Goans was in his yard, and saw Wilson coming, and thereupon got his shut-gun, and went about one hundred yards towards Wilson, to a point on the inside of the inclosure, and shot the latter when on the opposite side of the fence. Some statements of the accused, put in evidence, tend to show that he shot before Wilson made any threats or

threatening demonstration. The accused states that the deceased drew his pistol, and swore he would kill him, Goans, and thereupon the latter fired the fatal shot.

Wilson is shown to have been a boisterous, desperate man, and on several occasions had threatened to kill Goans, to whom the threats had been communicated. The accused has the reputation of a quiet, law-abiding citizen. Since his confinement his conduct has been exemplary. Some of the prisoners broke jail, in which he was confined, and escaped, but he refused to avail himself of the opportunity thus afforded, and did all in his power to assist the officers, and to prevent other inmates from escaping.

Our constitution declares that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." The indictment for a capital offense furnishes a strong presumption of guilt, and this presumption must be applied in all such cases on application for bail. There must be other facts and circumstances which overcome this presumption before the prisoner can be bailed. One or even two mistrials will not furnish the accused the absolute right to give bail. As said in *Alexander's case*, 59 Mo. 598, 21 Am. Rep. 393: "There may be circumstances connected with the trials which would produce a disagreement which would entitle the prisoner to no claims whatever. The failure, however, to agree upon a verdict twice in succession is a strong consideration, and, coupled with other facts, may turn the scale, and show that the object sought may be attained by admitting to bail." The object of imprisonment before trial is said to be to secure the forthcoming of the person charged with the commission of a crime. In that case there had been two mistrials, and the prisoner refused to escape, though an opportunity had been afforded him so to do. The court, in substance, said that where a jury has disagreed twice, and where it satisfactorily appears that the attendance of the accused to stand his trial will follow, the court may, in the exercise of a sound discretion, admit to bail, and accordingly the prisoner was admitted to bail in that case.

In the leading case of *People v. Tinder*, 19 Cal. 549, 81 Am. Dec. 77, it is said: "So bail may be taken where, upon trial, the evidence for the prosecution and defense has been produced, and there has been a disagreement among the jurors, or where, after verdict, a new trial has been granted, for the insufficiency of the evidence to warrant a conviction. Cases of

this kind justify the allowance of bail in the discretion of the court, without hearing other evidence as to the guilt or innocence of the accused."

One mistrial and attending circumstances may go further to overthrow the presumption of guilt arising from the finding of the indictment than two mistrials. Here there has been one mistrial, under favorable circumstances for the prosecution, and the prior and subsequent conduct of the accused shows to our satisfaction that he has not and has never had any thought of evading trial. The only undisputed circumstance against allowing bail is the fact, disclosed in the evidence, that accused went towards deceased with his gun, when he knew deceased was in a great rage. This evidence tends to show that he invited and brought on the difficulty, rather than acted in self-defense. On the other hand, there is much evidence tending to show that deceased prepared himself and started to the spring intending to provoke a difficulty, and that the accused understood these actions and movements, and stepped away from the cabin that the children might be out of danger, and that he did not shoot until deceased drew his revolver, and threatened to kill the accused.

Under all the circumstances of this case, we are of the opinion that the accused should be let to bail, and accordingly we fix the amount of the recognizance at the sum of ten thousand dollars. In view of the adjournment of the court before sureties can be procured and bond given, the prisoner is remanded, but upon his entering into a recognizance in said sum, with two or more sufficient sureties, conditioned according to law, and approved by the judge of the circuit court of Morgan County, he shall be discharged.

RIGHT TO BAIL. — Admission to bail is a right of the accused which cannot be denied, except in capital cases, where proof is evident or the presumption great: *People v. Tinder*, 19 Cal. 539; 81 Am. Dec. 77, and note 87-89; *Dunlap v. Bartlett*, 10 Gray, 282; 69 Am. Dec. 320.

WADDELL v. WADDELL.

[99 MISSOURI, 333.]

VESTED REMAINDER CREATED BY DEED WHEN. — A deed conveying to the grantee a life estate, and providing that after his death the title in fee-simple shall go to and vest in the children and heirs at law of such grantee, equally, to be divided among them as tenants in common, creates a vested remainder in his children in being at the time of its execution and delivery; and since the words "children and heirs at law," as used in the deed, constitute a class, the estate in remainder will open and let in such of the same class as come into being during the continuance of the particular estate, and they likewise will take a vested remainder.

WORDS "HEIRS AT LAW," IN DEED, MAY BE CONSTRUED AS BRING USED INTERCHANGEABLY WITH CHILDREN, or as meaning grandchildren or descendants, where such construction is just and reasonable, accords with the evident of the grantor, and is consistent with the principles of law; and this is especially true under a statute which provides that the issue of a person entitled shall take the share of his ancestor.

INTEREST OF CHILD IN VESTED REMAINDER DESCEADS TO HIS HEIRS. — Where a deed creates a vested remainder in the children of the grantee, the interests of any of such children as die before the termination of the life estate of their father will descend to their respective heirs.

PETITION FOR PARTITION NOT MULTIFARIOUS WHEN. — Where children of a grantee take as tenants in common, a petition for partition is not multifarious because it joins all those living and the heir of one deceased as parties defendant, though some of the tenants have purchased the interests of others. Such purchase does not confer upon the purchasers any exclusive right to any portion of the land. And where in such suit a general right to the whole land is being litigated, and this is the basis of the litigation, it matters not that the parties litigant rely upon distinct and independent rights.

Suit brought by Hannah W. Waddell, widow of John J. Waddell, against James W. Waddell, Hannah L. Groves and her husband, and John F. Waddell, Robert L. Waddell, Alonzo W. Waddell, Arthur K. Waddell, and Mattie E. Waddell, minor children of James William Waddell, son of John J. Waddell, deceased, for the partition of certain lands held by the ancestor of the defendants, John J. Waddell, under a deed from John Waddell, dated June 6, 1847, containing the clause quoted in the opinion. Demurrers were interposed to the petition, on the ground that the petition did not state facts sufficient to constitute a cause of action, and on the ground that it was multifarious. The demurrers were sustained, and the plaintiff electing to stand upon her petition, a final judgment was entered against her, from which she appealed.

W. T. Wood and J. D. Shewalter, for the appellant.

A. F. Alexander, and Wallace and Chiles, for the respondents.

SHERWOOD, J. This proceeding is one for the partition of certain lands, and necessarily involved in the cause is the proper construction to be given to the deed therein mentioned.

The clause of the deed thus brought in question is as follows: "To have and to hold the said real estate, with the appurtenances, to the said John J. Waddell, and to his heirs forever, in trust, however, for the following purposes, that is to say: The said John J. Waddell, of the second part, is to have, possess, and enjoy the said several tracts or parcels of land hereinbefore conveyed, and to be seised of the same, to and for his own exclusive use, benefit, and behoof, for and during his natural life, doing nor suffering any unnecessary waste; the said lands and tenements, nor any interest in the same, to be liable for any debt or debts of the said John J. Waddell which he has contracted or may hereafter contract, and on the death of said John J. Waddell, the title, in fee-simple, to go and vest in the children and heirs at law of the said John J. Waddell, equally, to be divided between them as tenants in common."

So that the chief question this record presents is, whether the remainder created by the deed was vested or contingent. The subjects of vested and contingent remainders, and the difference and distinction between them, meet with frequent and elaborate discussion and illustration in the text-books, as well as in the reported cases. It is unnecessary, however, to go at length into the authorities in order to arrive at the proper result in this case, since our own reports furnish us with instances which suffice our present purpose, and serve well to illustrate the distinction between remainders vested and those contingent.

Thus in *Jones v. Waters*, 17 Mo. 589, where land was devised by the testator to his wife for and during her natural life, and after her death to descend to her "children" by him, equally, share and share alike, it was held that these words created a vested remainder in the children, and that one of them, who predeceased his mother, had an interest subject to sale; and it was remarked that the devisees in remainder were ascertained by the will, and they were to have the enjoyment of the estate as soon as the estate for life ended, and that the devise of the remainder was not to such of the children as may be alive at the death of the mother, but to all of the children of the marriage.

Aubuchon v. Bender, 44 Mo. 560, presents a case of the same deed creating both kinds of remainder. There, by the terms

of the deed, the grantor was to stand seised of the property to his own use during his life, and after his death, "the use, benefit, usufruct, and title to the same shall revert and vest" in the five children named in the deed, "and such other children in lawful wedlock by him begotten as shall be living at the time of his death, and their heirs." And upon this it was ruled that as to the five children named in the deed, a vested remainder was created, and as to those that should be "living at the time of his death," the remainder was contingent.

In *Emison v. Whittlesey*, 55 Mo. 254, the conveyance was to the mother during her natural life, and upon her death, the remainder, in fee-simple absolute, to vest in the children then living, etc., and it was ruled that, as at the time of the execution of the deed no one could tell that any of the children would survive their mother, the remainder was only a contingent one.

So, too, in *De Lassus v. Gatewood*, 71 Mo. 871, the clause of the will declared: "I give and bequeath unto my beloved wife, etc., all my property, etc., to have and to hold, etc., during her natural life or widowhood. And at the marriage or death of my said wife, etc., all my estate heretofore bequeathed shall be equally divided between my children that are alive," etc.; and it was ruled that a contingent remainder was thereby created.

Contrasting the foregoing cases with that at bar, there seems no ground to question that a vested remainder was created in the children of John J. Waddell. The petition alleges and the demurrers admit that at the time of the execution of the deed to John J. Waddell there were three children then alive of the marriage, to wit, Martha G. Waddell, James William Waddell, and Mary Ellen Waddell; that two other children of the marriage were subsequently born, sons, who died in infancy, and without issue; that Martha G., having married, died intestate, leaving, as her child and heir at law, Hannah Groves; that Mary Ellen intermarried with one Moore, died without issue, but testate, having devised her interest in the lands to her mother, the plaintiff, for and during her natural life, with full power to dispose of the same as she might choose.

The words "children and heirs at law," as used in the deed, must be construed as constituting a class, and when this is the case, the estate in remainder will vest in those who were living at the time of the execution and delivery of the deed, and will open and let in such of the same class as come in

esse during the continuance of the particular estate; in which case, all the authorities agree that the remainder is a vested one, equally as operative for the benefit of those *in esse*, as for those *in being*: 2 Washburn on Real Property, 5th ed., 599, 600, 637; 4 Kent's Com., 13th ed., 203, note, 205, 206; *Moore v. Weaver*, 16 Gray, 305; *Gernet v. Lynn*, 31 Pa. St. 94; *Graham v. Houghtalin*, 30 N. J. L. 552; *Wolford v. Morgenthal*, 91 Pa. St. 30; *Wager v. Wager*, 1 Serg. & R. 374.

And the words "heir at law" may well be construed as as being used interchangeably with children, or as meaning grandchildren or descendants. And this is especially true where, as under our statute, the issue of a person entitled takes the share of his ancestor: R. S. 1879, secs. 2161, 2165.

There is no lack of authority in support of the position that, if the words used in the context warrant it, and such construction will carry into effect the manifest intention that moved the execution of the deed or the signing of the will, then such intention will be made effectual, and the word "heirs" will be construed as meaning children, and *vice versa*, and children as issue, grandchildren, or descendants, if the justice or reason of the case requires it: 4 Kent's Com., 13th ed., 419; 3 Washburn on Real Property, 5th ed., 282; *Haverstick's Appeal*, 103 Pa. St. 394; *Warn v. Brown*, 102 Pa. St. 347. And the fact that a deed is the instrument requiring such liberality of construction, provided such construction is just and reasonable, and accords with the evident intent of the grantor, and it is consistent with the principles of law, should not be allowed to defeat such liberal and beneficial construction, any more than if the instrument under examination were a will: *Huss v. Stevens*, 51 Pa. St. 282, and cases cited; *Wyth v. Blackman*, 1 Ves. Sr. 196; *Royle v. Hamilton*, 4 Ves. 437.

Having reached the foregoing conclusion, it is quite unimportant to discuss a point so strongly pressed by counsel for defendants as to the effect of the abolition of the rule in Shelley's case, since the effect of our statute, which accomplishes that result (R. S. 1879, sec. 3943), is not considered as having any appreciable bearing on the case at bar.

The premises considered, we consequently hold that all of the children of John J. Waddell, whether living at the time of the execution of the deed, or born subsequently thereto, were equal sharers in the land conveyed by the deed of their grandfather, and took thereby a vested estate in remainder, and that the plaintiff, as the mother of Frank C. and Edward

A., who died intestate and childless in infancy, acquired an interest in the land in dispute equal to that of the other brothers and sisters of the said defendants. The plaintiff also acquired a life estate in the land in consequence of the devise made to her by her daughter Mary Ellen Moore. But the plaintiff did not acquire, by reason of such devise, a greater interest than a life estate (2 Redfield on Wills, 346) because she had conferred upon her by the will of her daughter the power to dispose absolutely of the interest Mrs. Moore formerly held in the land, since the power conferred was not exercised, and if exercised, would of course have defeated any claim now made by plaintiff.

Now, as to the petition being obnoxious to the charge that it is multifarious. This objection is not well taken, for two reasons: 1. Under the ruling already made, Martha G. Waddell took an equal interest in the land as the other children, and this interest descended to her daughter, Hannah L. Groves, and under the original deed the whole tract was conveyed by the deed in one body, and none of those entitled thereto have any exclusive interest in the same; they take as tenants in common, and not otherwise; and the fact that some of those tenants may have purchased interests of the others does not affect this point, nor confer upon the purchasers any exclusive right to any portion of the land. 2. Besides, here a general right to the whole land is being litigated, and where this is the basis of the litigation, it matters not that the parties litigant should rely upon distinct and independent rights: *Donovan v. Dunning*, 69 Mo. 436; *Bobb v. Bobb*, 76 Mo. 419; *Rinehart v. Long*, 95 Mo. 399.

The judgment will therefore be reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

WHEN THE WORDS "HEIRS" AND "CHILDREN" ARE USED in different parts of a deed, the grantor will be presumed to have known the difference of meaning, and to have used each word in its technical sense: *Kay v. Connor*, 8 Humph. 624; 49 Am. Dec. 690.

DEVISE TO A CLASS. — A devise to one for life, and then to his children, will include all his children up to the time of the devise, whether born after the decease of the testator or not, and whenever the distribution among children is postponed to any particular period by a will, all the children will be included who are in existence when such period arrives: *Thompson v. Garwood*, 3 Whart. 287; 31 Am. Dec. 502.

HENRY V. SNEED.

[99 MISSOURI, 407.]

CONVERSATIONS BETWEEN HUSBAND AND WIFE ADMISSIBLE IN EVIDENCE WHEN. — In a suit to enjoin the sale of a wife's real estate under a deed of trust given to secure the payment of certain notes made by her husband in a sale to him of property induced by fraud, both the husband and the wife may testify in relation to conversations between themselves as to the transaction, as a part of the *res gesta*, and also on the ground of fraud. Such testimony is, under the circumstances, admissible *ex necessitate rei*. A fraud-feasor who uses the husband as a mere conduit through which to induce the wife to sign and acknowledge the deed of trust by which the desired and designed end is to be accomplished cannot be permitted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed.

PETITION, AIDING BY ANSWER. — Any lack in a petition of tender of an issue as to whether the defendant was a purchaser in good faith of the notes in suit is supplied by an allegation in the answer that the notes were purchased by the defendant in good faith.

BURDEN OF PROOF OF BONA FIDE TRANSFER OF NEGOTIABLE NOTE ON HOLDER WHEN. — Where it is clear that a note had its origin in fraud, and the answer alleges a purchase in good faith, the burden is on the defendant who claims to own the note to show a *bona fide* transfer thereof before maturity, and this burden is not sustained by evidence from which the date of the transfer does not appear except by inference.

KNOWLEDGE BY AGENT NOTICE TO PRINCIPAL WHEN. — Where the agent of a purchaser of a note having its origin in fraud had knowledge that "there was trouble about the trade" in which the note was given, this is sufficient to charge the purchaser with notice of the fraud.

INNOCENT PURCHASER AS TO HUSBAND NOT SO AS TO WIFE WHEN. — Where notes of a husband procured through fraud are secured by a recorded deed of trust on his wife's land, knowledge by the indorsee of such notes that the husband had executed a compromise of his claim of fraud will not make the indorsee an innocent purchaser as to the wife.

WIFE NOT ESTOPPED BY ACT OF HER HUSBAND WHEN. — A married woman seized of an estate in the ordinary way, and not as a separate estate, is incapable of being estopped by an act of her husband in which she did not join, even though she be a surety for him.

MERE RELATION OF HUSBAND AND WIFE CREATES NO AGENCY IN HIM to bind her by his representations, in the absence of proof that she is seized of a separate estate.

WIFE WHO IS SURETY FOR HER HUSBAND MAY INVOKE EQUITABLE INTERVENTION in her behalf against fraud especially directed against her property, even when he is in no position to ask for a like relief.

SUIT for an injunction. The opinion states the case.

John Montgomery, Jr., for appellant Sneed.

Smith, Silver, and Brown, for appellant Salmon Falls Bank.

W. S. Shirk and E. J. Smith, for the respondents.

SHERWOOD, J. Robert C. Sneed, of Sedalia, owned a set of abstract-books, worth, according to Morey's statement, not over two thousand dollars, for which he was willing to take four thousand dollars, and offered them to H. D. Stringer for that sum, so Stringer says; but Stringer thought of something better than that, and so suggested it to Sneed. Thereupon they laid their heads together, and by certain covinous contrivances, so managed matters that one Captain Wilbur F. Henry, the nominal plaintiff herein, and whose powers of deglutition seem to rival those of the great fish off the coast of Tarshish, was induced, by false memoranda, in the hands of Sneed, to believe that the abstract-books had brought into the hands of Sneed the previous year a revenue of seven thousand dollars, and after considerable apparent efforts on the part of Stringer, Sneed was led, with much pretended reluctance, to fix a price on the books at ten thousand dollars. Stringer, in the mean while, having so manipulated Henry, and inflamed his imagination as to the great profits to be gained thereby, persuaded him to go in with him, and buy the books, the terms stated to Henry being that Stringer would put in five thousand dollars, spot cash, for one half interest, and Henry, who was impecunious, and known to be so, was to raise his half of the purchase-money by giving five notes of one thousand dollars each, having several years to run, and securing the same on the real property of his wife, in Sedalia, as well as on his interest in the abstract-books. The books were accordingly bought at the sum mentioned, ten thousand dollars, and Bud Shobe, who assisted in bringing about the consummation of the affair, and was the notary who took the wife's acknowledgment to the deed of trust, was the partner of Stringer in the real estate business, and was handsomely paid for his trouble in assisting Sneed and Stringer in their machinations against Henry. When the trade was about to be closed, Stringer left town, but, on going, placed in Shobe's hands a check for five thousand dollars on the First National Bank of Sedalia, of which Thompson, Sneed's brother-in-law, was cashier; this check was payable to Shobe's order, and he, on the trade being closed, indorsed and delivered it to Sneed, who went through the dumb show of examining the signatures, and then pronounced it good, and also said that he had been to the bank to see, etc.

Stringer had no funds in the bank, and he says, in his deposition: "That check business was arranged by me to shut the

Cap.'s eyes." Stringer was to get his half interest in the books for nothing, in consideration of his services in effecting the sale of one half interest in the books to Henry, or he was to receive one thousand dollars, at his option; and it seems he took the latter. The check was never presented to the bank, nor was it ever intended to be. Sneed knew this, and Thompson knew it. The latter, at the time, and for years previously, had been financial agent of the Salmon Falls Bank, and so continued during the time covered by this litigation.

The last four of the five notes executed by Henry, and secured as aforesaid, were transferred by Sneed to Thompson to negotiate; the first one of them being retained by Thompson in order to prevent its being negotiated, and Sneed still owns this note. Thompson transferred the other four notes, so he says, to the Salmon Falls Bank, and paid Sneed three thousand seven hundred dollars, as the proceeds of such transfer.

Without Mrs. Henry's knowledge or consent, Sneed, after the deed of trust was given, released Henry's half interest in the abstract-books from that deed.

As soon as the one-thousand-dollar note which first fell due matured, Montgomery, the trustee, advertised the property for sale, and this proceeding was instituted with the purpose to perpetually enjoin and restrain the trustee and the defendant Sneed from selling Mrs. Henry's property under said deed; that said deed might be set aside and annulled, and all cloud cast by the same on her title be removed, etc.

The Salmon Falls Bank, as the petition recites, was "made a party hereto on its own motion, claims to be owner of said notes, and claims some rights under said deed of trust, wherefore it is made a party hereto, that its rights, if any in the premises, may be litigated and determined." The petition did not charge any fraud nor any notice thereof on the bank; but in its separate answer, the latter set up the purchase of the notes before maturity for full value, and without any notice of the equities alleged by plaintiffs, etc. A short time after Captain Henry had purchased the one-half interest in the books, and had commenced to do business with them, he observed the smallness of the receipts from them, heard from friends that he had been swindled, began to suspect the honesty of the transaction, and so went around to the bank and asked Thompson if the check for five thousand dollars, given by Stringer, had ever been presented or paid, but was told by the latter that that was a "bank secret."

Growing more dissatisfied, Henry instituted, in his own name and behalf, a proceeding similar to the present one, which, upon representations and assurances of Sneed and Stringer that the transaction was honest, and that the check for five thousand dollars had actually been paid, he was induced to compromise, and gave a writing to that effect to Sneed, which the latter, it seems, lost no time in showing to Thompson, who thereupon asked Henry in regard to it, when he told him that the suit had been settled and dismissed, and that he knew no good reason why he should not negotiate the notes; and the notes were thereafter negotiated by Thompson, as aforesaid.

At this time, however, Henry did not know, though he strongly suspected, that the transaction was not a fair and honest one, was not apprised, and did not have the knowledge, that the "check business" was a mere sham, contrived for the very purpose of deceiving him, and through him his wife, into securing the notes. And Thompson evidently knew that Henry did not know the true character of the check, while he did. Upon this state of facts, a mere outline of which has been given, and which will be more fully set forth by the reporter, the circuit court entered the following decree:—

"Now, at this time, come again the parties to this action, by themselves and their attorneys, and this cause having been tried and the evidence heard, as well as the argument of counsel, at the last term of this court, and said cause having been taken under advisement by the court till now, and the court, having fully considered the same, doth now find all the issues herein for the plaintiffs; and doth find that on July 18, 1883, the plaintiff E. Josephine Henry, then and now wife of plaintiff Wilbur F. Henry, owned in her own right, as her general property, one hundred feet off the north end of the west half of lot one (1), in block thirty-seven (37), in the original town (now city) of Sedalia, in Pettis County, Missouri, and that on said day the plaintiff Wilbur F. Henry executed to defendant R. C. Sneed his five promissory notes described in the petition, being for one thousand dollars each, and bearing seven per cent per annum interest, and falling due in one, two, three, four, and five years, respectively, from the date; that to secure said notes the plaintiffs executed and delivered to defendant John Montgomery, Jr., their deed of trust, which is recorded

in book 32 of deeds of trust and mortgage records in said county, on page 48, conveying to him the above-described real estate, and certain abstract-books, and personal property described in it, said books and personal property being the consideration of said notes, with power to sell the same on failure to pay said notes as therein provided, and the court doth find that the execution of said notes and deed of trust was procured by fraud and deceit, as stated in the petition herein, practiced on said W. F. Henry and E. Josephine Henry; and that thereafter the said Sneed, for a valuable consideration, released said books and personal property from said deed of trust, said books and personal property being the property of said Wilbur F. Henry, and that plaintiff E. Josephine Henry had not, at that time, or till about the commencement of this suit, any knowledge or notice of the said release of said books and property; and the court further finds that, although it appears that thereafter the defendant Salmon Falls Bank, through its agent, J. C. Thompson, bought all of said notes except the one first falling due, and before the maturity of the same, yet said bank is not an innocent purchaser thereof, but in fact had, by its said agent, full knowledge and notice of said fraud, and also of said release of said books and personal property at the time of said purchase, and said agent assisted, by concealment of facts within his knowledge, and by declining, when asked for the same by said W. F. Henry, to state to him said facts as to the perpetration of said fraud, and the said bank thereafter, with notice of all said facts, bought said notes at a discount from their face value, and is not an innocent purchaser, or entitled to the protection of the court. Wherefore, it is ordered by the court that the injunction herein be made perpetual, and that the defendants, and each of them, and all persons acting for them, or by, through, or under them, be forever restrained and enjoined from selling said above-described real estate, or any of the same, under the said deed of trust, and that said deed of trust be, and the same is, hereby fully canceled and held for naught, and it is adjudged that plaintiffs recover of said defendant R. C. Sneed their costs and charges herein expended, and that execution issue therefor."

1. We are met, at the outset of the investigation of the errors assigned, by the declaration that error was committed by the trial court in admitting the husband, as well as the wife, to testify in relation to conversations between them-

selves as to the transaction concerning the abstract-books. It does not appear, in the evidence before us, whether the wife had a separate estate in the land in question, or whether she was seised of a fee in the land at common law, or whether she gained her title under the provisions of the married woman's act, or whether the husband and wife were in actual occupation of the property.

If the wife were seised under the act just mentioned, it might be very difficult to state just how much, if any, "marital interest" the husband would have in his wife's land, in consideration of the stringent provisions of section 3295 of the Revised Statutes of 1879. Nor does it appear whether the husband was tenant by the curtesy initiate. And inasmuch as there is no testimony on this point, it would be unsafe to say just what the husband's interest in the case before us is.

Several things are, however, made very clear by the testimony: 1. That the defendants Sneed, Stringer, and Shobe were engaged in a most audacious scheme of fraud; 2. That the husband was used as the conduit through which the fraud-feasors operated to induce the wife reluctantly to sign and acknowledge the deed of trust, which would have accomplished the end desired and designed by the conspirators but for the timely interposition of a court of equity. The conversations then between the husband and wife, which brought about, and were intended to bring about, the result had in view, were clearly a part of the *res gestæ* (*State v. Gabriel*, 88 Mo. 631, and cases cited), and would therefore seem to occupy a different attitude from the ordinary confidential communications between husband and wife.

On one occasion, we held that a letter written by the husband to his wife, authorizing her to take the title to certain land in his name, did not fall within the rule respecting confidential communications between husband and wife, nor did the testimony of the former, touching such letter, fall within such rule: *Darrier v. Darrier*, 58 Mo. 222, and cases cited. But that was a contest *inter sese*. We incline to the opinion, however, that the testimony of both husband and wife, as to the conversations referred to, was admissible on a much broader ground, and for a more elevated reason. At common law, parties to the record were admitted as witnesses, as a marked exception to the general rule, where fraud was charged, or embazlement, or where, on general grounds of public policy, it was deemed essential to the purposes of jus-

tice: 1 Greenl. Ev. 14th ed., sec. 348, and cases cited. In the present case, Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed.

Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong, and assist his own fraud by such an objection. The rule he invokes was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all of its protean manifestations. We shall therefore rule that the testimony of both husband and wife was, *ex necessitate*, competent as to their conversations, on two grounds: that those conversations were a part of the *res gestæ*, and on the foot of the fraud.

2. But it is said that the bank was an innocent purchaser of the notes; that, as such purchaser, it took the mortgage with them as an incident, possessing all the negotiable characteristics of the notes themselves, and therefore the bank should prevail.

"The principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, or if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary; for the presumption is natural that an instrument so issued would be quickly transferred to another": 1 Daniel on Negotiable Instruments, 3d ed., sec. 815.

Where nothing else appears, no circumstances which would operate as constructive notice of the facts which impeach the original validity of the instrument, the holder will make out a *prima facie* case by proving that the instrument was endorsed to him for value before maturity. Having done this, his right of recovery is impregnable, unless the defendant prove that he had actual notice of facts which should have prevented a purchase by him: 1 Daniel on Negotiable Instruments, 3d ed., sec. 819.

In the case at bar, how has the professed holder of the notes upheld its title thereto? That the notes had their origin in a base fraud, no one can dispute. That Thompson was aware of the true nature of the whole transaction is equally indisputable. Stringer never at any time had any funds deposited in the bank on which the check was drawn; the check was never presented for payment, or paid. Stringer had been to Thompson shortly before Henry brought his first suit, and asked him to say that the check for five thousand dollars "was good," and he refused. Henry had also been to see him, endeavoring to see Stringer's bank account, and to ascertain whether the check had been paid, but could gain no information from the reticent Thompson. And the latter, as he testifies, had information additional to that already mentioned, which he had obtained from other sources; for, speaking of the time when Stringer came to see him, he says: "At that time I heard there was trouble about the trade."

It was not necessary, under the authorities, to fasten notice on Thompson and his principal, the bank, that he should have had notice of the particular fraud, etc., in order that such principal should be affected by it. On this point, Daniel says: "Thus, if, when he took the bill, he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury, from circumstances fairly warranting such an inference, that he knew, or believed, or thought that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy the title": 1 Daniel on Negotiable Instruments, sec. 799. And while it is true there is a presumption that the transfer of the papers occurred before maturity, yet such presumption, being without any written corroborative testimony, is of the slightest nature, and open to be blown away with the slightest breath of suspicion: 1 Daniel on Negotiable Instruments, sec. 784 a.

The circumstances already related, then, bring this case fully within the rule in regard to commercial paper, and cast the burden on the indorsee to show such a transfer of that paper as will afford absolute protection to the holder. No issue, it is true, was tendered by the petition as to whether the Salmon Falls Bank was a purchaser in good faith of the notes in suit, but the answer of the bank tendered such an issue in complete form, and this, under the doctrine of express aider, supplied any lack of the petition in this respect: *Garth v. Caldwell*, 72 Mo. 622, and cases cited.

The bank thus assumed the affirmative of the issue itself had made. How did it support that issue? It should certainly have done so by proof of an equally affirmative character. This it signally failed to do. Thompson does not state that the notes were transferred to the bank prior to maturity. He does not pretend to give the date when the transfer occurred. He says he has "a letter that will tell"; but he does not produce it. And it is only by circuitous inference and a comparison of dates that the conclusion can be reached that the notes were negotiated while current. This sort of testimony does not meet the exigencies of the rule before mentioned. The bank was challenged by its self-raised issue to give the date when the transfer of the notes occurred, and it should have done so in order to maintain its position of an innocent purchaser.

3. But granting that the bank, owing to the agreement and representations made, as aforesaid, by Henry to Thompson, was such a purchaser as to him, can it be so regarded as to Mrs. Henry? Her name does not appear to the agreement, nor does it appear that Thompson knew that she had been consulted or had assented thereto, or that she was even aware of its being made. And the deed of trust, being upon record, apprised Thompson, and through him the bank, of the situation of affairs; of the wife's interest in the real estate, and the relation of surety which she bore to her husband: *Bank v. Burns*, 46 N. Y. 170. Being thus apprised of Mrs. Henry's interest in the premises, and, besides, aware of her interest from other sources, it belonged to him to ascertain that the matter had been adjusted, not only to Henry's satisfaction, but also to his wife's. Fair dealing demanded nothing less than this at his hands. The wife was as much a party in interest as the husband; indeed, more so, because she had everything at stake.

In view of the foregoing facts, the bank cannot be regarded as an innocent purchaser as to the wife, even if it can be so regarded as to the husband; and the finding of the lower court on this latter point must therefore be held as supported by the evidence.

4. But there are other and stronger reasons which conduce toward upholding the decree aforesaid. It is strenuously urged that Henry was the principal in the notes, and his wife, having mortgaged her land to secure them, was in all respects his surety, and that, this being the case, Henry being estopped

By his compromise agreement, his wife, being his surety, is estopped also. It may be conceded, as a general rule, that the contract of the surety is accessorial to that of his principal, and that, consequently, whatever will estop the principal will estop the surety also.

But this doctrine, well established as it is, has no bearing on the present case, for these reasons: Under the rule stated, the surety is indeed estopped; but why? Because he is *sui juris*, and being competent to contract, is equally capable of being estopped. This *status* cannot be affirmed of a *feme covert*: 7 Am. & Eng. Ency. of Law, tit. Estoppel, p. 24; at least, unless possessed of a separate estate; and there is not a particle of testimony on this point in the case before us. Treating Mrs. Henry, then, as a *feme covert* seised of an estate in the ordinary way, she was as incapable of being estopped by an act of her husband in which she did not join, as she would be by her sole deed in which he did not join. Estoppels *in pais*, except as aforesaid, do not apply to married women: *Rannells v. Gerner*, 80 Mo. 474, and cases cited. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect: *Mueller v. Kaessmann*, 84 Mo. 318, and cases cited. No such effect would be attributed, under the rulings of this court, to the sole deed of a married woman unpossessed of a separate estate. The uniform position taken by this court on this point is abundantly sustained by authority.

There are cases, however, reported, where married women are held estopped by fraud unmixed with contract; but in such cases their conduct must be intentional and fraudulent: *Bigelow on Estoppel*, 510 et seq. But such a charge could not be maintained against the real plaintiff in this case, Mrs. Henry.

5. And owing to the nature of the estate, which, it will be assumed, in the absence of proof to the contrary, the wife held, the mere relation of husband and wife created no agency in the husband to bind her by his representations, or create an estoppel against her, even had he assumed to do so: *Wilcox v. Todd*, 64 Mo. 388; *Hall v. Callahan*, 66 Mo. 316.

6. Again, cases are not wanting to show that the wife whose property is bound for the notes of the husband will not be estopped by the representations of the husband, though made by him to an innocent purchaser who bought of the original payee, to the effect that such notes were "good and valid

securities, that there was no defense to them, and that they would be paid at maturity": *Campbell v. Babcock*, 27 Wis. 512.

7. And it has also been ruled, where a wife was a surety for her husband and others in the purchase of the stock of a national bank, where the proceedings were characterized by illegalities and fraud, and where the fraud was especially directed against the property of the wife, that this would authorize the wife, as such surety, to successfully invoke equitable interposition for the protection of her property in her behalf, notwithstanding her principals were in no position to demand a like relief, nor when they could not recede from the contract into which they had entered: *Denison v. Gibson*, 24 Mich. 187.

As the foregoing views dispose of all questions of any practical importance in this case, and understanding the action of the circuit court to go no further than to protect the wife's interest in her land, we affirm the judgment.

HUSBAND AND WIFE — WITNESSES. — As to when a wife or a husband may testify, one for or against the other, see *Spit's Appeal*, 56 Conn. 184; 7 Am. St. Rep. 303; *Chamberlain v. People*, 23 N. Y. 85; 80 Am. Dec. 255, and note 258, 259; but compare *Johnson v. Boice*, 40 La. Ann. 273; 8 Am. St. Rep. 528, and note. The common-law disabilities incident to the relation of husband and wife are in force, unless changed by statute: *Dean v. Metropolitan etc. R. R. Co.*, 119 N. Y. 540; so that in a case where a wife is the substantial plaintiff, and no showing is made bringing the husband within any of the exceptions in the statute, he is properly excluded from testifying: *Harrington v. City of Sedalia*, 98 Mo. 584. A husband or wife may testify for each other in cases in which one acted as the other's agent: *Council Grove etc. R'y Co. v. Center*, 42 Kan. 438; *Dyer v. State*, 88 Ala. 225. The testimony of a wife as to matters of which she has no knowledge, except as informed by her husband, is incompetent: *Eddy v. McCall*, 71 Mich. 497.

HUSBAND'S AUTHORITY TO ACT FOR HIS WIFE cannot be presumed, and a person seeking to hold her for acts done by another must show affirmatively full authority, to bind her: *Fechheimer v. Peirce*, 70 Mich. 440.

BURDEN OF PROOF AS AGAINST A BONA FIDE HOLDER, IN CASES WHERE FRAUD IS SHOWN. — Possession of a note is *prima facie* evidence of *bona fide* holding, but if there is evidence of fraud in its inception, the burden of proof is upon the indorsee to show that he took it without notice of fraud: *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Rep. 273; *Perkins v. Prout*, 47 N. H. 387; 93 Am. Dec. 449, and note.

WINTERS v. KANSAS CITY CABLE RAILWAY CO.

[99 MISSOURI, 500.]

DUTY OF CABLE-RAILWAY COMPANY RUNNING CARS ON CITY STREETS. —

A cable-railway company operating dangerous machinery at a rapid speed on and along the public streets of a city is in law bound to know that men, women, and children have an equal right to the use of the highway, and will be upon it, and its servants are bound to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the streets.

CARE DEMANDED OF GRIPMAN ON CABLE-CAR TURNING CURVE IN STREET.

— It is not sufficient care on the part of a gripman on a cable-car, on approaching a curve in a street, to ring the bell, and, observing that the way is clear in front, to go ahead, neither looking to the right nor left.

SUPREME COURT HAS ONLY TO SEE THAT THERE IS SUFFICIENT EVIDENCE to support the verdict, so far as a demurrer to the evidence is concerned, when the question of negligence in the case is one of fact.

CHILD INJURED BY RUNNING IN FRONT OF CABLE-CAR CANNOT RECOVER, if the gripman operating the car was free from negligence.

NEGLECT OF PARENT NO DEFENSE IN ACTION BY CHILD FOR NEGLIGENT INJURY. — The negligence of a mother in permitting her child of tender years to go upon a public street unattended by a person of mature years, where it is injured by being run over by a cable-car, is no defense to an action by the child to recover for its injuries.

NEGLECT OF PARENT IN ACTION BY HIM FOR INJURY TO CHILD. —

Even where the action is brought by a parent for an injury to his child, all the circumstances are to be taken into account, and if the parent took as much care of the child as reasonably prudent persons of the same class and in the same situation in life ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action. The negligence of the parent to defeat such action must be the proximate cause of the injury.

ORDINARY CARE MEANS THAT DEGREE OF CARE which an ordinarily prudent and careful person would exercise under like circumstances.

ACTION for personal injuries. The opinion states the case.

Johnson and Lucas, for the appellant.

Jewell and Thompson, for the respondent.

BLACK, J. One of the defendant's cable-cars ran upon the plaintiff, a boy three years of age, at the crossing of Ninth Street and Grand Avenue, in the city of Kansas, crushing one of his legs, so that amputation became necessary. Hence this suit by his next friend, for damages.

The refusal of the court to give defendant's instruction, in the nature of a demurrer to the evidence, makes it necessary to set out the substance of the evidence on the one side and the other. Ninth Street runs east and west, and Grand Avenue, north and south. The train of cars was going east, on

Ninth Street, and thence around the curve, at the crossing of the two streets, and north, on Grand Avenue. The accident occurred just as the front or grip car passed around and cleared the curve. The car, in approaching the curve, ascended a grade, but the surface of the streets at the crossing could be seen by the gripman for one hundred or more feet before he reached it. There were no obstructions on the streets. The grip-car was open at both ends, but closed at the sides for a space of about two feet from the floor, and above that there were glass windows. The gripman's position placed him in the middle of the car.

The boy and his sister, ten years of age, went to a building about a block distant from the crossing, by permission of their mother, to gather kindling-wood. She lived close to the same place, and says she let them go because she was not able to buy kindling. The children crossed over the tracks, from the south to the north side of Ninth Street, and thence went east, on the sidewalk, to Grand Avenue, and thence eastward across that street, towards their home. The car ran against the boy at a point about thirty-five or thirty-seven feet east of the west curb of Grand Avenue.

Of two witnesses, who were nearly a block distant, one of them testified: "When I first saw the boy, he was three or four feet from the lamp-post at the northwest corner of the streets. He ran straight from that point until the car hit him. It did not seem to last longer than the snap of the finger." The other witness says: "The boy was trying to cross the street; there was a little girl ahead of him; the last I saw of her, she was going." Mr. Vincent, who was twenty or thirty feet distant, says he first saw the boy when near the west track; that he heard some one having a child's voice call, but did not see the little girl until after the car struck the boy. This witness and another person, who was in the car, and saw the boy when within two feet of the car, say he was toddling along about as a boy of his age would move. Other evidence shows that the gripman was looking to the front; that his attention was called to the presence of the boy, but too late to enable him to stop the car in time to avoid the injury.

Mr. Davis testified for the defendant: "I was on the north side of the grip-car, about three seats from the front. I saw the girl and boy starting over the crossing; just as we swung up on top of the hill, the girl stopped, and turned her head

and looked at us. As the grip-car came around the curve, she ran back, screaming, and threw up her hands, leaving the child by himself; he went in front of the train. At the time the girl turned and ran back, she was three or four feet from the track; the gripman then had no time to stop the car. I first saw the child when about one step from the sidewalk; he had a pail or little bundle in his hand."

The gripman testified: "I saw the child just as I was about to strike it; it was not more than a foot from the car; I stopped the car within about six feet after I saw the child."

On cross-examination, he says: "When I first saw the child, it was at the lamp-post on the sidewalk. There was a young lady close to him, a rod from him; saw no children near the boy. I did not see any little girl; I just looked out and noticed everything was clear, and went on; I did not look any more. The first I knew the child got across, and was struck. Q. These grip-cars have closed windows all around? A. Yes, sir. Q. Standing at the grip, you could see this place, between the lamp-post and where the boy was hurt? A. Yes, sir. Q. If you had been looking? A. You could see a part of the way there; you could see it all by stooping down."

If the defendant's liability in this case is limited to want of care on the part of its servants after they saw the boy in a dangerous situation, then the plaintiff failed to make out a *prima facie* case. The evidence is all to the effect that the gripman used all the means at his command to avoid the calamity, after he knew the boy was in danger. But the principle of law just stated does not control this case. The defendant is operating dangerous machinery at a rapid speed on and along the public streets of the city, and must know, and in law is bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It is the duty of the defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the street. The duty to be on the watch is no more than ordinary care under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances. Now, the evidence of the gripman tends to show that when he came to the crossing he rang his bell, looked out and saw the way was clear, and then went on around the curve, neither looking to the right nor left. There is other evidence, to the effect that the boy toddled along for a distance of at least thirty-five feet on the

street, and in the direction of the approaching car, after the gripman saw him on the sidewalk, and the car must have traveled a much greater distance. Other persons saw the boy and girl when they started across the street in front of the approaching car. Had the gripman cast an eye to the left when he reached the curve, or whilst passing it, he would doubtless have discovered these children in time to have avoided the injury. He says he stopped the train in a space of six feet after the grip-car had passed the curve; and if that be so, then there is reason to believe that the evidence of another witness, to the effect that it could have been stopped on the curve in a space of four feet, is true. But assuming that both estimates should be doubled, to approach accuracy, still the jury might well have found, as they did by their answers to interrogatories, that the gripman could, by the exercise of ordinary care, have seen the plaintiff in time to have stopped the train before plaintiff was injured. It was admitted on the trial that this accident happened on one of the principal traveled streets in the city. If we say the jury should have been directed to find for defendant, then we must hold, as a matter of law, that it was sufficient care on the part of the gripman, when approaching the curve, to ring his bell, see that the track before him was clear, and go ahead without thereafter looking to the right or left. This we are not prepared to do. The question of negligence in this case was one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict, so far as the demurrer to the evidence is concerned.

If the child ran in front of the car, and the gripman was free from negligence, then there ought to be no recovery. This proposition was placed before the jury in very clear terms by an instruction, given at the request of the defendant, wherein it is said that before the plaintiff can recover, he must prove that he was injured in direct consequence of the negligence or carelessness of the person in charge of the defendant's car.

But it is said there is no evidence that the defendant was operating the road at the time of the accident, and that some of the instructions are bad, because they assume that it was the defendant's car which ran over the plaintiff. No such question was mooted in the trial court. Besides, it may be inferred, from the evidence of the brakeman and superintendent, that defendant was operating the road. But aside from all this, the answer says the plaintiff's mother contributed to

the injury, by placing him in charge of a careless person, who allowed plaintiff "to get in front of defendant's cars suddenly, while they were in motion, so that the injury suffered by plaintiff was inevitable." The ownership of the car and operation of the road by defendant are admitted facts in the case. We fail to discover any merit in either of these objections.

The court, at the request of the plaintiff, gave this instruction: "3. The court instructs the jury, as a matter of law, that negligence on the part of the little girl, who was with the child injured, or near him at the time of said injury, cannot affect the question of the right of plaintiff to recover in this case."

But refused to give the following instruction, asked by the defendant: "2. If the plaintiff's mother and natural guardian permitted plaintiff to go on or near the tracks of defendant, alone, or in charge of a careless or incompetent person, and the carelessness and incompetency of such person contributed directly to plaintiff's injury, then the finding will be for the defendant."

Hartfield v. Roper, 21 Wend. 615, 34 Am. Dec. 273, is cited to show that the court erred in its ruling on both of these instructions. The substance of the doctrine there asserted is, that where a child of such tender years as not to possess the discretion to avoid danger is permitted by its parents or guardian to be in the public highway, the negligence of the parent or guardian will defeat a recovery in a suit by the child. This doctrine has been followed in some of the states. It is sometimes placed on the ground that the parent is the agent of the child, and other cases place it on the ground of identity between the parent and child. It probably stands as well on no ground at all as it does on either of them. The whole doctrine has been severely criticised by some of our best text-writers, and denied by many courts. This court, more than twenty years ago, repudiated the doctrine in the case of *Boland v. Missouri R. R. Co.*, 36 Mo. 484. Says Wagner, J., for the court: "Whilst the decision in *Hartfield v. Roper* may be supported by the facts in the case, as failing to show such negligence as would fix liability on the defendants, the reasoning of the learned judge on infantile responsibility is certainly harsh, and repugnant to justice." The court then gives its adherence to the contrary doctrine, asserted in the leading case of *Robinson v. Cone*, 22 Vt. 213; 54 Am. Dec. 67. This is a suit by the child itself, and the negligence of the mother, if

any there was, in allowing it to go upon the public streets unattended by a person of mature years, constitutes no defense whatever to this action. In support of this conclusion and the former ruling of this court, it is sufficient to cite 1 Shearman and Redfield on Negligence, 4th ed., sec. 78; Beach on Contributory Negligence, sec. 43; *Erie City P. R'y Co. v. Schuster*, 118 Pa. St. 412; 57 Am. Rep. 471; *Bellefontaine etc. R'y Co. v. Snyder*, 18 Ohio St. 399; 98 Am. Dec. 175.

Even in the case of a suit by the parent all the circumstances are to be taken into account, and if the parent took as much care of the child as reasonably prudent persons of the same class and in the same situation in life ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action: 1 Shearman and Redfield on Negligence, 4th ed., sec. 72; *O'Flaherty v. Union R'y Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Frick v. St. Louis etc. R'y Co.*, 75 Mo. 542. The negligence of the parent, to defeat his or her action, must be the proximate cause of the injury: *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 475. Unless these principles of law are adhered to, the poor of the land will be deprived of all benefit of the public schools in our cities which cannot be reached but by passing over and along the public highways. But no more need be said upon this subject; for this is not a suit by the parent or guardian.

Appellant contends that the court erred under the modified doctrine stated in *Stillson v. Hannibal etc. R. R. Co.*, 67 Mo. 671. There the little girl, eight years old, was in the actual presence of the father. She attempted to pass through a small aperture between two cars standing on a track, and at a place which was not a public crossing, and was injured by the cars coming together. It was held that the negligence of the father should be imputed to the child in a suit by the child, inasmuch as the father was present and pointed out the place for her to go through, and she was attempting to follow out his directions when injured.

Of the cases there cited, that of *Holly v. Boston G. L. Co.*, 8 Gray, 123, 69 Am. Dec. 233, was one where the injury seems to have been caused from the negligent act of the father. In *Waite v. Railroad*, 96 Eng. Com. L. 728, the child was in charge of its grandmother. The case of *Ohio & Miss. R'y Co. v. Stratton*, 78 Ill. 88, is a case where the boy, ten years old, was traveling with his father. The case concedes that the negligence of the parent or guardian having charge of a child of

tender years would not excuse the carrier from using all the means in its power to prevent the injury, but relieves the carrier from liability for the negligence of the parent when the parent's negligence is the proximate cause of the injury. "In that event," says the court "it is not the negligence of the defendant, but of the party having the control of the child; and if any liability attaches to either party, it must be to the latter."

The girl in the present case was, to some extent, the protector of the little boy, but she was a child only, herself, and it is both unreasonable and inhuman to say that she filled the position of a parent or guardian. It might as well be said of twin children out of the sight of the mother, that each is the responsible guardian for the other. If the girl was to some extent negligent, that would not relieve the defendant from the exercise of due care. The Stillson case does not profess to disturb the former ruling of this court, and, it is believed, has never been so regarded. It is, at most, no more than an exception to a general rule, and must stand on its own peculiar circumstances, and is wholly inapplicable to the present case. The facts as in that case stated would indicate that the negligence of the father, and not of the defendant, was the proximate cause of the injury. The court, in a subsequent part of the opinion, after stating that the question of negligence was one for the jury, uses this language: "But there must be some evidence on which to base instructions to a jury. After a careful examination of the testimony in the case, aided by the maps in the record, we have been unable to conjecture in what respect it is claimed that there was negligence on the part of the defendant." There being no negligence on the part of the defendant, it was no more liable to an infant than an adult; so that, after all, the father's negligence was the proximate cause of the injury. And that case should be regarded as standing on this ground, and no other.

It follows, from what has been said, that the court did not err in its ruling upon these two instructions. In other instructions asked by the defendant, the jurors were told, in clear terms, that, before they could find for plaintiff, he must prove that he was injured in direct consequence of the negligence of the person in charge of defendant's car; that if the gripman was using ordinary care in looking out and attending to his business, but did not see the plaintiff in time to stop the car before running over him, then there was no negligence on his

part; and that ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances. The plaintiff's instructions are in accord with those given for defendant, and no substantial objection is made to them. The judgment is therefore affirmed.

INFANTS — NEGLIGENCE. — Negligence of an infant as a bar to a recovery for personal injuries, see *Westbrook v. Mobile & O. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587, and extended note 590-596.

PARENT AND CHILD. — The negligence of a parent is no excuse for the misuse or abuse of the child by another: *Westbrook v. Mobile & O. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587.

GREATER CARE MUST BE EXERCISED BY RAILWAY COMPANIES in running through populous towns than under other circumstances: Note to *Cooper v. Lake Shore etc. R'y Co.*, 11 Am. St. Rep. 491; *Thompson v. New York etc. R. R. Co.*, 110 N. Y. 636.

STREET-RAILROAD COMPANY HAS NO EXCLUSIVE RIGHT TO THE USE OF ITS TRACKS, but simply a paramount right; and while a person lawfully upon the tracks may not carelessly or willfully obstruct the cars, he is not absolutely bound to keep off the tracks, and when injured by the carelessness of the company, without his own fault, he may recover damages therefor: *Fleckenstein v. Dry Dock etc. R. R. Co.*, 105 N. Y. 655. The car-driver must control the car and exercise a reasonable degree of care and watchfulness, to prevent collisions and injury to persons crossing and traveling upon the track: *Brooks v. Lincoln St. R'y Co.*, 22 Neb. 816.

DOWELL v. GUTHRIE.

[99 MISSOURI, 653.]

DISCHARGE OF FIRE-WORKS AT SUITABLE PLACES IS NOT UNLAWFUL, when not prohibited by statute or municipal regulations; but the circumstances may be such as to make it culpable negligence.

SHOOTING OFF FIRE-WORKS FROM VERANDA OF COURT-HOUSE, in the center of a public square in a city, from troughs so arranged that the rockets would pass over the persons there assembled to witness the display, is not, in and of itself, an unlawful or wrongful act.

BURDEN OF PROOF OF NEGLIGENCE IS ON PLAINTIFF WHEN. — When a plaintiff's case is founded on negligence, and not upon intentional injury, the burden of proof is upon him, throughout the trial, to prove it.

WHETHER FIRE-WORKS WERE NEGLIGENCELY DISCHARGED IN PARTICULAR CASE IS QUESTION FOR JURY. — In an action to recover damages for the negligent discharge of fire-works, the question whether the defendants exercised the care in handling and discharging them that cautious and prudent persons would have used under like circumstances is to be determined by the jury from a consideration of a number of particular facts; and it is not proper, in such a case, for the court to select some of the leading facts, and to declare, as a matter of law, that such facts constitute negligence.

EVIDENCE WHICH DISCLOSES DISASTER IS OF ITSELF SUFFICIENT to entitle the plaintiff to go to the jury, where the defendant had charge of instruments which were highly dangerous. And it is therefore error for the court to instruct the jury that evidence which showed that fire-works were dangerous, and were discharged by the defendants, and that plaintiff was injured thereby, would not alone authorize them to draw the inference of want of due care.

JURY NOT REQUIRED TO FIND WHICH PARTICULAR ACT OF NEGLIGENCE CAUSED INJURY WHEN. — Where the evidence tends to show that a large quantity of combustible materials was placed on the floor of a narrow veranda, in the windows opening onto it, and on chairs near the windows, that the defendants smoked cigars during the entire performance, and that loose candles were found on the floor, on fire, it is error for the court to instruct the jury that, before finding for the plaintiff, who was injured by the discharge of one of the rockets on the veranda, they must determine which particular act of negligence occasioned the unforeseen discharge of the rocket which caused the injury.

PRESENCE OF PLAINTIFF AT DISPLAY OF FIRE-WORKS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE WHEN. — The mere presence of the plaintiff at a display of fire-works, as a spectator, where it does not appear that he had anything to do with the discharge, does not make him a joint wrong-doer, or render him guilty of contributory negligence.

ACTION for personal injuries. The opinion states the case.

George Robertson and H. S. Priest, for the appellant.

G. B. Macfarlane, for the respondents.

BLACK, J. This is a suit for damages, brought by the plaintiff against the four defendants, who had charge of and gave a pyrotechnic display in the city of Mexico on the night of the 11th of November, 1884. The plaintiff was hit in the face by a sky-rocket, which broke his cheek-bone and destroyed one eye. There was a verdict and judgment for defendants, to reverse which the plaintiff prosecutes this appeal.

The petition states that defendants negligently selected the veranda of the court-house for the purpose of giving the display; and that they so carelessly and negligently handled and shot off the fire-works, and permitted the same to be so negligently handled and shot off, that the plaintiff was struck by a sky-rocket in the charge of and under their control.

From the record, it appears various citizens of the city of Mexico concluded to celebrate the result of the Presidential election of 1884. The programme adopted consisted of speaking, marching of political clubs, and a display of fire-works. The plaintiff, in company with his club, went to Mexico in the afternoon for the purpose of participating, and at night marched in the procession. He did not contribute to the

purchase of the fire-works, and took no hand in the execution of that part of the programme; but he learned, from a companion, while on the way, that there was to be such a display; and there is evidence from which it may be inferred that he had such knowledge before he started.

The defendants constituted a committee to take charge of the fire-works, and they selected the east veranda of the court-house as the place from which to make the display. The veranda is eight feet wide, fifty feet long, and is reached by passing through windows from the second story. The court-house is on the public square in the center of the business portion of the city. The square is surrounded by streets, and there are buildings from one or two blocks to the east, beyond which there is an open country; and it was in this direction that the rockets were directed when fired from the troughs placed on the veranda. The rockets contained from an eighth to a half pound of powder, and would shoot with great speed, —almost that of a gun. It is estimated that eight or ten thousand persons were present on the occasion in question.

The defendants stored the fire-works in a room in the second story of the court-house, and took them out on the veranda from time to time, as needed. They would take out at one time a bundle of large rockets, from two to four or five boxes of darts, or small rockets, and a quantity of Roman candles. The candles were placed in chairs and in the windows, and the darts, or small rockets, were kept in the boxes, but were placed on the floor, next the wall of the building. The rockets, when fired from the troughs, threw back sparks of fire on the floor, covering a circle of two, three, or four feet. One witness says: "I will not say they did not go back as far as the wall of the court-house, nor to the fire-works that were on the floor." Towards the close of the exhibition, a bunch of candles was discovered on fire on the floor of the veranda, whirling around and throwing out balls of fire in every direction; these balls of fire came in contact with the rockets and darts, causing a conflagration, and the defendants retreated into the court-house. Several witnesses say they saw the sky-rocket which hit the plaintiff leave the veranda just as they saw the blaze begin at that place. The plaintiff was on the street, and about two hundred feet from the court-house, when hit. The defendants used lighted cigars to ignite the fire-works, and nothing else.

The evidence of the defendants tended to show that the

unexploded fire-works were placed away from the ends of the troughs. They do not know how the candles got on the floor, nor how they were ignited. Some other persons were on the veranda, against the orders of the defendants, and some were there, or in the windows, by their consent.

1. The first question presented is, whether the display of these fire-works was of itself an unlawful act. In *Conklin v. Thompson*, 29 Barb. 218, a boy, on the Fourth of July, exploded a fire-cracker under the plaintiff's horse, while he was traveling upon the streets in a city, whereby the horse was frightened and died. The act, it is said, was wrongful, and the party committing it assumed the responsibility of all the bad consequences which ensued. In *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578, the plaintiff was hurt by the explosion of a bomb, fired in the street of a city to signal the meeting of a political club; and it was said that the use of a street for such a purpose was illegal, and *per se* constituted a public nuisance, and that all persons concerned in doing the act, or who caused it to be done, were liable for all damages proximately resulting therefrom. Judge Cooley, in his treatise on torts, citing these and other authorities, lays down the law in these words: "When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery; that is to say, for a care proportionate to the danger of injury from it. The firing of guns for sport or exercise is not unlawful, if suitable place is chosen for the purpose; but in the streets of a city, or in any place where many persons are congregated, it might be negligence in itself": Cooley on Torts, 2d ed., 705.

The discharge of fire-works at suitable places, when not prohibited by statute or municipal regulations, cannot be said to be unlawful; but the circumstances may be such as to make the act of discharging an explosive culpable negligence. In this case, these facts are clear and undisputed: The fire-works were not displayed in the streets, but from the court-house, in the center of the public square. The defendants so arranged the troughs that the rockets would pass over the assembled people. The persons assembled, the plaintiff included, were there for the very purpose of witnessing this display. Under these circumstances, it cannot be said that shooting off the fire-works was, in and of itself, an unlawful or wrongful act. The case is quite unlike those which have been cited from 29 Barbour and 43 New Jersey Law.

and prudent persons would have used under like circumstances. While there is an abundance of evidence tending to show the want of such care, still, the conclusion must be drawn from a mass of details, and the question is one for the jury to decide.

4. The first instruction given on behalf of the defendants, after reciting a number of immaterial matters, proceeds to say: "Then the mere facts that said fire-works were discharged by the defendants, and that they were of a dangerous character, and that plaintiff was injured thereby, are not sufficient to entitle plaintiff to recover; but he must go further, and show, to the reasonable satisfaction of the jury, that defendants were guilty of that want of care inconsistent with the handling of the goods they had charge of, and plaintiff's injuries resulted therefrom."

Abbott, in his treatise on trial evidence, at page 584, with the citation of a number of cases, says: "It is enough for the plaintiff to raise a fair presumption of negligence. Probability is sufficient to go to the jury. If defendant had charge or control of the instrument of disaster, and if it was highly dangerous, or if he owed a special duty of care to one in the position of plaintiff, the disaster is evidence of negligence, sufficient to go to the jury, unless the circumstances indicate some cause consistent with due care on defendant's part." The defendants in this case had charge of instruments which were highly dangerous, and the evidence which disclosed the disaster was of itself sufficient to entitle the plaintiff to go to the jury. It may be true, in an abstract sense, that the facts stated in the instruction would not authorize a verdict for the plaintiff; but the jury must have understood the instruction to mean that the evidence which showed that the fire-works were dangerous, and were discharged by defendants, and that plaintiff was injured thereby, would not alone authorize them to draw the inference of want of due care. We are of the opinion such facts would have entitled the plaintiff to go to the jury. The instruction should be refused.

The court, at the request of the defendants, gave the following instruction: "2. The court instructs the jury that they cannot lawfully resort to guess or conjecture in determining what caused the sky-rocket to be ignited and discharged in the direction of the plaintiff, and unless the evidence proves, to the reasonable satisfaction of the jury, what caused it to be so ignited and discharged, and that such cause was

the result of negligence or carelessness on the part of the defendants, the plaintiff cannot recover any damages."

The evidence tends to show that a large quantity of the combustible material was placed on the floor of the narrow veranda, in the windows, and in chairs; that defendants smoked cigars during the entire performance; and that loose candles were found on the floor, on fire. The jury might well infer that defendants were negligent in all of these respects, and that some one of these negligent acts caused the explosion, without being able to point out which one it was. It was not necessary to a verdict for the plaintiff that the jury should settle in their minds which particular negligent act caused the conflagration. It is enough to know that the rocket which caused the injury was put in motion by reason of the carelessness of the defendants in handling or shooting off the fire-works. Under the circumstances of this case, this instruction is not a fair presentation of the law. The defendants' fourth instruction is of a like character, and should be refused.

There seems to have been an effort on the part of the plaintiff to get the court to direct a verdict for him; and on the other hand, the defendants endeavored to procure a verdict, by cutting the evidence up into pieces. We do not approve of either theory. It is unnecessary to review the instructions in detail. We have said enough to show upon what theory the case should be tried.

5. There is no evidence showing or tending to show that the plaintiff was a joint wrong-doer. He took no part in and had nothing to do with the display of the fire-works. The fact that he was present at the display does not show, nor does it tend to show, contributory negligence: *Fisk v. Wait*, 104 Mass. 71; *Bradley v. Andrews*, 51 Vt. 530. The judgment is reversed, and the cause remanded.

NEGLECTANCE — BURDEN OF PROOF. — The burden of proving negligence is upon him who alleges it: *Blanchard v. Lake Shore etc. R'y Co.*, 128 Ill. 416; 9 Am. St. Rep. 630, and note; *Chesley v. Mississippi etc. Boom Co.*, 39 Minn. 84; *Wallace v. Western N. C. R. R. Co.*, 104 N. C. 442; *Brown v. Sullivan*, 71 Tex. 470; *San Antonio etc. R'y Co. v. Bennett*, 76 Tex. 152.

NEGLECTANCE — QUESTION FOR WHOM. — Where there is a conflict of evidence, the question of negligence is for the jury: *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note; *Denver etc. R. R. Co. v. Wilson*, 12 Col. 20; *Fiske v. The Forsythe etc. Co.*, 57 Conn. 118; *Michigan City v. Boeckling*, 122 Ind. 39; *Chicago etc. R. R. Co. v. Adler*, 129 Ill. 335; *Chicago etc. R'y Co. v. Lane*, 130 Ill. 117; *Wight etc. Co. v. Pocsekai*, 130

Ill. 139; *Louisville etc. R. R. Co. v. Mitchell*, 57 Ky. 327; *Smith v. Township of Sherwood*, 62 Mich. 159; *Post v. Express Co.*, 76 Mich. 574; *Alexander v. Big Rapids*, 70 Mich. 224; *Flater v. Fey*, 70 Mich. 644; *Ashton v. City Ry Co.*, 78 Mich. 587; *Cassfield v. Chicago etc. Ry Co.*, 78 Mich. 356; *Rogers v. Railroad Co.*, 81 S. C. 379; *Gulf etc. Ry Co. v. Compton*, 75 Tex. 667; and so, also, is contributory negligence a question for the jury: *Central etc. Banking Co. v. Miles*, 88 Ala. 257; *Lord v. Pueblo etc. Co.*, 12 Col. 390; *Mobils etc. R. R. Co. v. Davis*, 130 Ill. 146; *Howland v. Union St. Ry Co.*, 150 Mass. 96; *Luke v. Wheat Mining Co.*, 71 Mich. 364; *Rajnowski v. Railroad Co.*, 74 Mich. 21; *Brown v. Hannibal etc. Ry Co.*, 99 Mo. 310; *Well v. Dry Dock etc. Ry Co.*, 119 N. Y. 147; *Ferry v. Long Island R. R. Co.*, 116 N. Y. 375; *Austin v. Elm*, 72 Tex. 392; *Artus v. Missouri P. Ry Co.*, 73 Tex. 191; *Abbot v. Duinell*, 74 Wis. 514. But where there is no conflict of evidence, the court may direct the verdict: *Dunn v. One Ave. etc. Ry Co.*, 96 Mo. 652.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

TALAMO v. SPITZMILLER.

[120 NEW YORK, 57.]

LEASE FOR MORE THAN A YEAR—STATUTE OF FRAUDS. — ORAL AGREEMENT between two persons that one of them shall take a lease of property for five years, and that both shall occupy it during such term, and each shall pay one half of the rent, is void by the statute of frauds; and if the one who agrees to take such lease does so, and becomes liable for rents for the full period specified therein, he nevertheless can recover from the other only for such time as he actually shares in the occupancy of the leased premises.

IF A LEASE IS VOID UNDER THE STATUTE OF FRAUDS BECAUSE FOR MORE THAN ONE YEAR, and not in writing, but possession is taken thereunder, no yearly tenancy is thereby created, and the tenant, on abandoning possession, is not thereafter answerable for rents.

LEASE. — PAROL AGREEMENT FOR A TERM OF YEARS IS NOT EFFECTUAL TO CREATE A TENANCY FOR ONE YEAR; but if the tenant takes possession, a tenancy for a year may be inferred, if there is anything to show that such tenancy is within the intent of the parties, as where there is a payment and receipt of an installment or aliquot part of an annual rent.

PAROL LEASE FOR MORE THAN ONE YEAR IS NOT EFFECTUAL TO VEST ANY TERM WHATEVER in the lessee, and when he comes into possession under it with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. This tenancy at will can be converted into a yearly tenancy only by a new contract, which, however, may be inferred from circumstances, when they permit it.

Charles B. Wheeler, for the appellant.

Quinby and Meads, for the respondent.

BRADLEY, J. The action was brought to recover the proceeds of the sale made by the defendant of the plaintiff's goods. The defendant admits his liability to account to the

plaintiff for the proceeds of such sale, and alleges several matters by way of counterclaim, which will be referred to so far as is essential to the determination of the questions presented for consideration on this review. The trial court found that on March 13, 1882, by an agreement of lease, in writing, under seal, made by Catharine Dickman and defendant, she leased to him a dwelling-house for the term of five years from May 1, 1882, at the annual rent of \$450 for the first year, and \$500 for each subsequent year, payable in monthly installments, in advance, which the defendant undertook to pay; that the defendant took such lease at the verbal instance and at the request of the plaintiff, and upon the unwritten understanding and agreement that they should jointly use and occupy the dwelling-house during the term mentioned in the lease, and that the plaintiff should pay to the defendant half the rent; that the defendant and plaintiff went into the possession of the house in May, 1882, and jointly occupied it until in November following, when the plaintiff quit the house, and has not since then occupied any portion of it; that the defendant has paid the monthly installments of rent as they fell due, and that plaintiff has paid nothing to the defendant on account of the rent. The court allowed to the defendant, against the plaintiff, a sum equal to one half the rent for the period of the joint occupancy, six and a half months.

And upon exception to the conclusion of the court, that the plaintiff was entitled to recover the amount for which judgment was directed, arises the question whether the defendant was entitled to the allowance of a greater amount against the plaintiff than that given by the court on account of the rent. The contention of the defendant's counsel is: 1. That the plaintiff became liable to pay the defendant one half the rent, which the latter undertook, by the lease, to pay as the installments should become due; 2. That if not so, the plaintiff became a yearly tenant, and was liable to the defendant for one half the amount of the rent for one year.

The plaintiff, not being a party to the lease, assumed no legal obligation to pay rent for the term, as a lease for more than one year not in writing was void: 2 R. S., p. 135, secs. 6, 8. The agreement between the parties, and under which the plaintiff entered into joint occupancy with the defendant, being void, gave to the plaintiff no right, and imposed upon the defendant no obligation, to permit him to go into or remain in possession of any portion of the house; and unless he became

a yearly tenant, his liability was for use and occupation for the time only which he occupied: *Thomas v. Nelson*, 69 N. Y. 118.

The mere fact that a person goes into possession under a lease void because for a longer term than one year does not create a yearly tenancy. If he remains in possession, with the consent of the landlord, for more than one year, under circumstances permitting the inference of his tenancy from year to year, the latter could treat him as such, and the tenant could not relieve himself from liability for rent up to the end of the current year. And the terms of the lease void as to duration of term would control in respect to the rent: *Coudert v. Cohn*, 118 N. Y. 309; 16 Am. St. Rep. 761. The parol agreement for five years was not effectual to create a tenancy for one year. Nor did the mere fact that the plaintiff went into possession have that effect. He remained in occupation a part of one year only, and the creation of a tenancy for a year was dependent upon something further. While it is not required that a new contract be made in express terms, there must be something from which it may be inferred,—something which tends to show that it is within the intention of the parties. The payment and receipt of an installment or aliquot part of the annual rent is evidence of such understanding, and goes in support of a yearly tenancy; and without explanation to the contrary, it is controlling evidence for that purpose: *Cox v. Bent*, 5 Bing. 185; *Bishop v. Howard*, 2 Barn. & C. 100; *Braythwaite v. Hitchcock*, 10 Mees. & W. 494; *Mann v. Lovejoy*, Ryan & M. 355; *Thomas v. Packer*, 1 Hurl. & N. 672; *Doe v. Crago*, 6 Com. B. 90.

While there may appear to have been some confusion in the cases in this state upon the subject, this doctrine has been more recently recognized: *Reeder v. Sayre*, 70 N. Y. 184; 26 Am. Rep. 567; *Laughran v. Smith*, 75 N. Y. 209.

In the cases last cited, the tenants had been in possession more than a year when the question arose; but having gone into occupancy under an invalid lease, their yearly tenancy was held dependent upon a new contract, which might be implied from the payment and acceptance of rent, and when once created, could be terminated by neither party without the consent of the other, only at the end of the year. The contention, therefore, that, by force of the original agreement between the parties, aided by the fact that the plaintiff went into the possession with the consent of the defendant, a tenancy

from year to year was created, is not so, and this is not alone sufficient to support an inference of the new contract requisite to create a yearly tenancy. The plaintiff paid no rent, nor while he was in possession was any request of or promise by him made to pay any. He simply went in under the original void agreement, and left within the year. There was no evidence to require the conclusion of the trial court that the plaintiff had assumed any relation to the premises which charged him with liability, other than for use and occupation during the time he remained in possession. The defendant's counsel, to support his proposition that the entry by the plaintiff, with the consent of the defendant, made him a yearly tenant, cites *Craske v. Christian U. P. Co.*, 17 Hun, 319, where it was remarked that a parol lease for a longer term than one year "operated so as to create a tenancy from year to year."

If that was intended by the learned justice as a suggestion that such a void lease operated as a demise for one year, it is not in harmony with the view of the court in *Laughran v. Smith*, 75 N. Y. 209. That remark in the *Craske* case was not essential to the determination there made, as rent was in fact paid for a portion of the term, nor can it be assumed that it was intended to have the import sought to be given to it. It must be assumed, upon authority and reason, that a parol lease for more than one year is ineffectual to vest any term whatever in the lessee named, and that when he goes into possession under it, with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay, at the rate of the stipulated rent, as for use and occupation: *Barlow v. Wainwright*, 22 Vt. 88; 52 Am. Dec. 79. This may be converted into a yearly tenancy by a new contract, which may be implied from circumstances, when they permit it. While the mere entry with consent will not alone justify it, a promise to pay, and a purpose manifested to accept, a portion of the annual rent provided for by the agreement may, as evidence, go in support of such a new contract. There was no such evidence in this case. The promise of the plaintiff to pay one half the rent was made preliminarily to his entry, and was part of and not distinguishable from the parol agreement with the defendant to occupy for five years, and pay one half the rent for that term. There does not seem to have been any evidence to require the conclusion that any other than such void agreement was made between the parties, or that the plaintiff became other than a mere tenant at will of the de-

fendant: 1 Woodfall on Landlord and Tenant, 1st Am. ed. from 13th Eng. ed., 221.

The other cases cited by the defendant's counsel do not support the proposition asserted by him. There is no opportunity, upon the facts found, or upon any which the evidence required to be found, to hold that the defendant took and held the lease as trustee for the plaintiff as to a portion of the demised premises, or that a relation was assumed by the plaintiff to the lease between the lessor and the defendant, which legally charged him with liability to the latter for moneys paid by him pursuant to it. The parol agreement between them was void, and ineffectual for any such purpose.

The judgment should be affirmed.

LANDLORD AND TENANT — LEASE FOR MORE THAN ONE YEAR — STATUTE OF FRAUDS. — A lease for more than one year must be made in the manner prescribed by the statute: *Coudert v. Cohn*, 118 N. Y. 309; 16 Am. St. Rep. 761, and note 764, 765.

LANDLORD AND TENANT — STATUTE OF FRAUDS. — As to the effect of parol leases for a period of more than one year, see extended note to *Wallace v. Scoggins*, post, p. 752. The principal case is difficult to reconcile with the expressions of the court in *Coudert v. Cohn*, supra, with reference to the effect of a parol lease in creating a tenancy for a year.

DWINELLE v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[120 NEW YORK, 117.]

CARRIERS. — WHILE THE PERFORMANCE OF THE DUTIES OF A CARRIER OF PASSENGERS IS TEMPORARILY SUSPENDED until it can make arrangements to overcome a difficulty, occasioned by a washout of its road-bed, its passengers continue entitled to all of the rights which pertain to passengers on a train moving towards the point of destination stipulated for in the contract of the carrier.

CARRIER'S DUTY TO PROTECT PASSENGERS. — Among the obligations which a carrier assumes is that of protecting its passengers against any injury from the negligence or willful misconduct of its servants, and of their fellow-passengers and strangers, so far as practicable, and to provide them with the usual accommodations and any information and facilities necessary for the full performance of the contract on the part of carrier.

CARRIERS. — PORTER OF SLEEPING OR DRAWING-ROOM CAR IS A SERVANT OF THE RAILROAD COMPANY, for whose misconduct it is answerable, though it does not own such car, nor hire nor pay such porter, if the car is run on its road under a contract between it and the sleeping-car company which required that the servants employed by the latter should be acceptable to the railroad company.

CARRIERS. — PERSONS IN CHARGE OF A DRAWING-ROOM OR SLEEPING CAR are to be regarded and treated, with respect to their dealings with passengers, as servants of the railroad company, which is answerable for their acts to the same extent as if they were directly employed by it. The law will not permit a railroad company engaged in the business of carrying passengers for hire, through any device or arrangement with a sleeping-car company, whose cars are used by the railroad company, and constitute a part of its train, to evade any duty imposed on it, by interposing the defense that a porter on a sleeping-car was not a servant of the railroad, but of the sleeping-car company.

QUESTION FOR THE JURY. — Whether a porter of a sleeping-car was not, at the time he committed an assault on a passenger, acting as a servant of a railroad company is a question for the jury, when it appears that such porter was the only person put forward or presented in the sleeping-car to perform the duty and service the railroad company owed such passenger.

CARRIERS. — FOR A WILLFUL AND MALICIOUS ASSAULT BY A SLEEPING-CAR PORTER UPON A PASSENGER, the railroad company is answerable, because every carrier of passengers undertakes absolutely to protect them against the misconduct of its own servants, engaged in executing its contract of carriage.

CARRIERS. — A PASSENGER IS ENTITLED TO ALL INFORMATION requisite to enable him to pursue his journey with safety and dispatch. His duty is to make all necessary inquiries, and the corresponding duty of the carrier is to give the information sought.

CARRIERS. — A SLEEPING-CAR PORTER, WHO MAKES AN ASSAULT ON A PASSENGER while the latter is seeking of him information necessary to enable the passenger to pursue his journey in another train which the carrier had provided for his transportation, may be regarded as in the service of the company, and the passenger may therefore recover from it compensation for injuries suffered from such assault.

ACTION to recover compensation for an assault upon the plaintiff by a porter. The plaintiff had purchased tickets which entitled him, with his wife, to a passage over the defendant's road from Geneva to New York in an ordinary car. The plaintiff also purchased, from the porter on a sleeping-car, tickets to entitle him and his wife to a section in the latter. He purchased these tickets of the porter, because there was no one else in charge of the sleeping-car. The train was detained at Utica, owing to a washout near Amsterdam; and after the plaintiff, with other passengers, had waited quite a while at Utica, he was informed by the porter that he must take another train to the washout, and then must take still another train to New York. The porter took the hand-baggage of plaintiff and his wife, and conducted them to the train they were to take from Utica to the washout. Upon reaching the sleeping-car which formed a part of this latter train, it was found that there was no vacant seat

for the plaintiff and his wife, and the porter then conducted them into an ordinary coach, and told them that probably another sleeping-car would be put on the train which must be taken after reaching the washout, and that they could have a seat in it. When the porter started to go away from plaintiff, leaving him in the ordinary car, he called the porter's attention to the fact that the latter had his sleeping-car tickets, and that he ought to be provided with something to show, on the other side of the washout, that he was entitled to sleeping-car accommodations. The porter, however, refused to give up the tickets, or even to go to the ticket-office to tell the officers of the road how things were, or to give any check or ticket which could be shown to the conductor on the other side of the washout. In fact, the porter insisted that further caring for the plaintiff was none of his business; and when plaintiff touched him slightly on the arm, saying, "You must not leave me without some satisfaction in this business," the porter answered: "Take your hand off of me, or I will hit you"; and at the same time struck plaintiff a violent blow in the face, knocking him down, and rendering him unconscious. This took place in the yard of the defendant at Utica, which at the time contained the depot, station, cars, trains, office, and employees of the defendant, and numerous passengers. The defendant moved to dismiss the complaint, upon the ground that the plaintiff had made out no cause of action against it; that the act of the porter was not within the scope of his authority, nor done while engaged in the performance of any duty which defendant owed to the plaintiff, and was not an act to be foreseen or guarded against by the defendant. The motion was granted by the trial court, and the judgment thereupon entered in favor of the defendant was affirmed by the general term of the supreme court. The plaintiff thereupon appealed to this court.

Hugh L. Cole, for the appellant.

Frank Loomis, for the respondent.

POTTER, J. The defendant was under contract obligations to transport the plaintiff, with his wife, from Geneva to the city of New York, and it had entered upon the performance of the contract, when further performance was temporarily suspended until the defendant could make arrangements to overcome the difficulty and obstruction caused by the washout of its road-bed.

While this was being done, the plaintiff was a passenger of the defendant, and entitled to all the rights which pertain to a passenger upon a train moving toward the point or destination specified in the contract of carriage. Among the obligations which such contract imposes upon the carrier are, "to protect the passenger against any injury from negligence or willful misconduct of its servants while performing the contract, and of his fellow-passengers and strangers, so far as practicable, to treat him respectfully, and to provide him with the usual accommodations, and any information and facilities necessary for the full performance of the contract upon the part of the carrier. And these obligations continue to rest upon the carrier, its servants and employees, while such contract continues and is in process of performance: *Thorpe v. New York Cent. etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185; *Parsons v. New York Cent. etc. R. R. Co.*, 113 N. Y. 355; 10 Am. St. Rep. 450; Thompson on Carriers of Passengers, 50; *Pittsburgh etc. R'y Co. v. Krouse*, 30 Ohio St. 224.

There cannot be any serious question that such are the ordinary duties and obligations between the passenger and the carrier.

The relation of the plaintiff and defendant being that of passenger and carrier, with the duties and obligations to each other resulting from such relation, these questions arise and require consideration in the determination of this case. Was the sleeping-car porter the agent of the defendant? And if so, was he engaged in the performance of his duties as such agent at the time of inflicting the blow upon the plaintiff?

The answer to the first question is, that the porter of a sleeping or drawing-room car, even in cases where there is a contract, like the contract put in evidence by the plaintiff in this case, between the railroad company which sells a passage ticket in its ordinary coaches to a passenger, and the proprietors of a sleeping-car who sell a ticket to the same passenger for a seat and berth in a sleeping-car running in the same train, is the servant of the railroad company. This question has been definitely settled by the highest court in this state and of the United States: *Thorpe v. New York Cent. etc. R. R. Co.*, 76 N. Y. 406; 32 Am. Rep. 325; *Pennsylvania Co. v. Roy*, 102 U. S. 451.

The contracts in those two cases are, in all essential respects, like the contract in this case. The railroad company,

in those cases, as in this case, did not own the drawing-room or sleeping car. Nor did it hire or pay the porter. The contract required that the servants employed by the sleeping-car company should be acceptable to the railroad company, with other stipulations of a correlative character, not necessary to be specified.

In those cases it was held that the law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company, whose cars are used by the railroad, and constitute a part of its train, to evade the duty that is imposed upon it by law, and that the defense that the porter was not the servant of the railroad company, but of the sleeping or drawing-room car company, is not a defense to the railroad company; or rather, in the language of Judge Andrews, "that the persons in charge of the drawing-room car are to be regarded and treated, in respect to their dealings with passengers, as the servants of the defendant (the railroad company), and that the defendant is responsible for their acts to the same extent as if they were directly employed by the company."

And this court, in the same case (*Thorpe v. New York Cent. etc. R. R. Co.*, 76 N. Y. 406; 32 Am. Rep. 325), holds that the act of 1858, chapter 125, introduced by the plaintiff in the case under consideration, authorizing railroad and sleeping and drawing-room car companies to make contracts of that character, carefully provided that it should not be construed to exonerate the railroad company from the payment of damages for injuries in the same way and to the same extent as if the cars were owned and provided by the railroad company.

These cases hold, as matter of law, that the porter of the sleeping-car is, in the performance of the duties and obligations of the railroad company under its contract to carry a passenger, the servant of the railroad.

The second of the above questions is, Was the sleeping-car porter engaged in the performance of his duties as such agent at the time of inflicting the blow upon the plaintiff? That question must, in this and similar cases, depend upon the evidence, and must be determined by the jury. The office of the court is to determine what facts are proper to be submitted to the jury for its determination of that question.

We think the evidence in this case should have been submitted to the jury. The evidence was to this effect: That the defendant had contracted to carry plaintiff to New York;

The passenger is entitled to all necessary information to enable him to pursue his journey with safety and dispatch, and he has often been held guilty of contributory negligence relieving the carrier from liability for his omission to make such inquiries: *Siner v. Great Western R'y Co.*, L. R. 3 Ex. 150, cited in note to the opinion in *Hulbert v. New York Cent. R. R. Co.*, 40 N. Y. 153.

If it is the duty of the passenger to make inquiry, it is the corresponding duty of the carrier to give the information sought. The porter had undertaken to furnish such information to the plaintiff, or to introduce him to the conductor of the sleeping-car for that purpose, and while so engaged had refused to complete the work, and struck plaintiff the blow complained of.

As we have seen, the defendant owed the plaintiff the duty to transport him to New York, and during its performance, to care for his comfort and safety. This duty of protecting the personal safety of the passenger, and promoting, by every reasonable means, the accomplishment of his journey, is continuous, and embraces other attentions and services than the occasional service required in giving the passenger a seat or some temporary accommodation. Hence whatever is done by the carrier or its servants which interferes with or injures the health or strength or person of the traveler, or prevents the accomplishment of his journey in the most reasonable and speedy manner, is a violation of the carrier's contract, and he must be held responsible for it.

The idea that the servant of a carrier of persons may, in the intervals between rendering personal services to the passenger for his accommodation, assault the person of the passenger, destroy his consciousness, and disable him from further pursuit of his journey, is not consistent with the duty that the carrier owes to the passenger, and is little less than monstrous. While this general duty rested upon the defendant to protect the person of the passenger during the entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract.

Hence we think the court should not have dismissed the

complaint, but should have submitted these facts, and the circumstances attending the blow, to the jury, upon the question whether or not the porter was in the performance of his duties as the defendant's agent when the blow was inflicted.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CARRIERS—DUTY TO PASSENGERS. — For the care required of carriers with respect to passengers, see note to *Parsons v. New York etc. R. R. Co.*, 10 Am. St. Rep. 457. For the duty required of carriers towards passengers temporarily alighting before reaching their destination, see *Missouri P. R'y Co. v. Foreman*, 73 Tex. 311; 15 Am. St. Rep. 786, and particularly note. For a carrier's duty to protect its passengers from violence and insult, see *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note.

MASTER AND SERVANT—TORTS OF SERVANTS. — Whether a servant who committed a tortious act did so in his master's service or to gratify his own spite is a question of fact for the jury: *Hussey v. Railroad Co.*, 98 N. C. 34; 2 Am. St. Rep. 312, and note.

CARRIERS—SLEEPING-CAR COMPANIES. — As to the liability of sleeping-car companies for personal injuries sustained through the wrongful acts of their servants, see note to *Pullman P. Car Co. v. Pollock*, 5 Am. St. Rep. 36. Compare *Pullman P. Car Co. v. Matthews*, 74 Tex. 664; 15 Am. St. Rep. 873, and note.

METROPOLITAN ELEVATED R'Y Co. v. KNEELAND.

[120 NEW YORK, 134.]

CORPORATIONS. — **ACTION MAY BE MAINTAINED AGAINST THE DIRECTORS OF A CORPORATION FOR FRAUDULENTLY ISSUING AND NEGOTIATING PROMISSORY NOTES** in its name, which have reached the hands of *bona fide* purchasers for value, and have thereby become legal obligations against the corporation, though payment thereof has not been made.

ONE WHO FRAUDULENTLY PLACES IN CIRCULATION A NEGOTIABLE INSTRUMENT OF ANOTHER, whether made by him or his apparent authority, and thereby renders him liable to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value of such instrument.

CORPORATIONS. — **DIRECTORS OF A CORPORATION WHO VOTED FOR A RESOLUTION TO PAY AN OFFICER A SALARY TO WHICH HE WAS NOT ENTITLED**, but who did not participate in a subsequent resolution that such salary should be paid by the issuing of negotiable notes of the corporation, are not answerable for damages to the corporation resulting from the issuing and negotiation of such notes.

ACTION against certain directors of a corporation for fraudulently issuing and negotiating promissory notes in its name, which have reached the hands of *bona fide* purchasers for

value. In August, 1884, and for nearly two years prior thereto, the defendant Kneeland was a stockholder, director, and president of the plaintiff. As such president he had not been called upon to perform any duties connected with the active management of plaintiff's affairs, nor was he entitled to any salary by any resolution or action of plaintiff's stockholders or directors, and his predecessor in office had never received any salary, nor had plaintiff ever agreed to pay him any salary as president or otherwise. On June 5, 1884, the defendants were directors of the plaintiff, and, with the exception of the defendant Gillett, attended a directors' meeting, and voted for a resolution, which was then adopted, to the effect that the defendant Kneeland be paid a salary of twenty-five thousand dollars per annum from the time of his election as president. Thirteen days after the passage of this resolution, another meeting of the directors of the plaintiff was held, at which all of the defendants were present, except Duggin and Slayback, and a resolution was adopted "that the president be and he is authorized to use the credit of the company by issuing and negotiating its notes, or otherwise, for paying the salary of the said president, said notes to be signed by the president and countersigned by the treasurer in the usual way and form, and not to exceed the limit of the amount heretofore authorized." Notes were then issued officially, signed and countersigned by the president and treasurer, representing in the aggregate the amount of \$43,950. Some of these notes were afterwards negotiated before maturity, and passed into the hands of *bona fide* purchasers for value without notice, but none of them have ever been paid. A demurrer to the complaint was interposed and sustained, with leave to the plaintiff to amend, and the plaintiff refusing to amend within the time granted, final judgment was entered against it, dismissing the complaint, with costs.

Edward S. Rapallo, for the appellant.

Francis C. Barlow and Nelson S. Spencer, for the respondents.

VANN, J. This is an action against the directors of a corporation for fraudulently issuing and negotiating promissory notes in its name, which, on reaching the hands of *bona fide* purchasers for value, became legal obligations against the company. The substantial question presented by the demurrer is, whether such an action can be maintained upon an allegation of liability to pay, without an allegation either of payment

or of actual loss. In an action for the conversion of a promissory note by wrongfully negotiating it to a *bona fide* holder for value, the maker need neither allege nor prove that he has paid it, but it is sufficient if he avers that he is legally liable to pay it: *Decker v. Mathews*, 12 N. Y. 313. The *gravamen* of such an action, as was held in the case cited, is the wrongful act of the defendant in causing a note without value, except to a *bona fide* holder, to become valuable by the sale thereof to such a purchaser as could enforce it against the plaintiff. It was also held in that case that a cause of action accrued to the maker as soon as he became liable upon the note through the transfer thereof, and that neither the right of action nor the measure of damages dependent upon the fact of payment.

This case was relied upon by the court when it rendered judgment in *Farnham v. Benedict*, 107 N. Y. 159, where the defendant, being in possession, without title, of certain town bonds that had been fraudulently issued through his procurement, and which were void in fact, although apparently valid, sold them to *bona fide* purchasers, and thus rendered them valid and binding upon the town, so that it was compelled to pay them. It was held that he was liable to the town for the amount of the bonds; and Judge Rapallo, in speaking for the court, said that immediately on the negotiation of the bonds a cause of action accrued in favor of the town, either in the nature of an action of trover for the face of the bonds, or as for money had and received for the money realized by him on the sale, according to the rule laid down in *Comstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142.

In *Thayer v. Manley*, 73 N. Y. 305, the defendant, by means of false and fraudulent representations, induced the plaintiff to execute and deliver to him three negotiable promissory notes, but before any of them became due, the plaintiff demanded them from the defendant, who refused to deliver them. He still held the notes at the time of the trial, but one of them had become due after the commencement of the action. It was held that, as the defendant had it in his power, when the suit was commenced, to dispose of the notes to a *bona fide* holder, in whose hands they would have been valid, and as the plaintiff was then entitled to recover the actual damage which might accrue to him, this right was not impaired by the subsequent maturity of one of the notes before a transfer; that as the judgment and a satisfaction thereof would transfer title to the notes to defendant, plaintiff was entitled to recover

the full value, but that to avoid circuity of action, a provision should be incorporated in the judgment, giving to defendant the right to cancel and return the notes as a satisfaction of the damages. It was also held that the measure of damages in such an action is the face of the note and interest, unless it should appear that it was of less value by reason of payment of the same, insolvency of the maker, or some other lawful defense.

In *Betz v. Daily*, 3 N. Y. Super. Ct. 309, it was held that in an action by a partner against his copartner and certain third persons for fraudulently making notes in the name of the firm and negotiating them so that *bona fide* holders could compel the plaintiff to pay them, the cause of action was completed when the wrong was done, and that payment of the notes was not essential to a recovery. Some of the notes were paid by the plaintiff after the commencement of the action and before trial, but a verdict for the amount of all the notes fraudulently negotiated was sustained. The court said: "The plaintiff was not injured to the amount of money which he had paid out in taking up these fraudulent notes at the time of beginning the action. The injury to him was done when the notes were first negotiated."

In *Town of Ontario v. Hill*, 33 Hun, 250, the defendants were held liable for wrongfully issuing the negotiable bonds of a town, some of which had fallen into the hands of innocent holders for value. It was determined that the cause of action accrued immediately upon the passing of the bonds into the hands of *bona fide* purchasers who could enforce them against the town. "In a legal sense," it was said, "the plaintiff had sustained damages by the action of the defendants when the bonds passed into the hands of persons who could enforce their payment against the town. The plaintiff's alleged right of action springs out of the defendant's breach of duty as public officers, and is in the nature of an action on the case for consequential damages." This case was subsequently reversed, but not on this point: *Town of Ontario v. Hill*, 99 N. Y. 324.

While the case presented by this appeal may not be a strict action of conversion, it bears a close analogy to actions of that character when brought by the makers of negotiable promissory notes for the conversion thereof. What is the nature of the injury for which such an action lies? It is not the loss of the material substance of the note, which is simply a small

piece of paper with a few words written thereon. Neither is it the loss of a contract, or of the evidence of a contract, that the maker could enforce, because it is his own engagement, in form, but not even that in fact. The wrongful destruction of an article is ordinarily a conversion thereof, but the destruction of a note that had had no inception would not be a conversion as to the maker, unless it might be deemed a conversion of the material substance only, which is not now important. The injury consists in the negotiation of the note, so that according to the law merchant it becomes a valid and enforceable contract against the maker, or as in *Thayer v. Manley*, 73 N. Y. 305, in retaining possession after demand made so that the wrong-doer had the power to put it into lawful circulation. Wrongfully aiding in the negotiation of a note, or wrongfully making a note to be negotiated by others, would appear to be injuries of the same character.

What was the nature of the tortious act of which the defendants, by their demurrer, admit they were guilty? Those who voted for the resolution which in form authorized one of their number to issue and negotiate notes of the plaintiff assumed to authorize and by authorizing caused some of the notes in question to be issued and negotiated. They had no power, express or implied, to pass that resolution, or its predecessor, which provided a salary for the president. They could not thus give away the property of the corporation. They could not bind the stockholders by voting to appropriate the assets of the company to an illegal purpose: *Butts v. Wood*, 37 N. Y. 317; *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201; *Odgen v. Murray*, 39 N. Y. 202; *Kelsey v. Sargent*, 40 Hun, 150; *Mauz Ferry G. R'y Co. v. Branegan*, 40 Ind. 361; *Holder v. Lafayette etc. R'y Co.*, 71 Ill. 106; 22 Am. Rep. 89; *Loan Association v. Stonemetz*, 29 Pa. St. 534; *Kilpatrick v. Penrose F. B. Co.*, 49 Pa. St. 118; 88 Am. Dec. 497.

Their action, as admitted on the record, was a violation of their duty as directors, a breach of trust, and a fraud upon the plaintiff. The result of their action was to cause notes to be made, purporting to be valid obligations of the plaintiff, although in fact void. While not the notes of the company, they appeared to be such, as they were issued by those having apparent authority. If nothing further had been done, however, the wrong would doubtless have been *injuria absque damno*; but the defendants who adopted the second resolution thereby authorized the negotiation of the notes, and some of

them were negotiated accordingly, and reached the hands of *bona fide* holders for value. These notes, as is here admitted, the plaintiff has become liable to pay, in consequence of the fraudulent conduct of those defendants. Thus the dead pieces of paper were, to this extent, given life, and converted into contracts binding upon the company without its consent. In what respect do these wrongful acts differ from those which, in the cases cited, were held to authorize an action for conversion, or an action in the nature of conversion? Do they differ in the character of the injury inflicted or loss sustained? Is there not in each the same presumption of damage springing from a liability wrongfully imposed? Were not all of these actions founded upon the fact that the maker, real or apparent, of a negotiable instrument had through the wrongful acts of another, become chargeable, so that he could be compelled to pay such instrument, which would not have ripened into a valid obligation against him but for such wrongful act?

We think that the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof. As the case under consideration fairly comes within this principle, it should be governed by it. The essential injury common to all cases of this character is the fraudulent imposition of liability. Hence there should be a common remedy, whether it is called an action in conversion, or in the name of conversion, or a special action on the case. These views lead to a reversal of the judgment as to all of the defendants who voted for the resolution authorizing the president of the company to issue and negotiate its notes for the purpose of paying him a salary to which he was not entitled. The defendants Slayback and Duggin, who demur separately, but through the same attorneys and upon the same grounds as the other defendants, except Kneeland, did not vote for said resolution, although they voted for the resolution to pay the president a salary. This act, although wrongful, was harmless, so far as appears, until supplemented by further action in which they did not participate, and for which, upon the record as presented, they cannot be held responsible. The passage of the resolution for the payment of a salary, without specify-

ing how it should be paid, did not bring the notes into existence, nor put them into circulation. No cause of action was set forth, therefore, as to those defendants, who are not alleged to have had any connection with the act that resulted in making and negotiating the notes.

The judgment should be affirmed as to the defendants Slayback and Duggin, but, under the circumstances, without costs. As to all the other defendants, the judgment should be reversed, and the demurrer overruled, with costs, with leave to such defendants to withdraw their demurrer and serve an answer, within thirty days, upon payment of costs.

CORPORATIONS—LIABILITY OF DIRECTORS.—Directors are liable to the corporation for fraud and misconduct in office: *Smith v. Poor*, 40 Me. 415; 63 Am. Dec. 672; *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255; as well as for unauthorized acts and negligence in the performance of their duties: *Patterson v. Stewart*, 41 Minn. 84; 16 Am. St. Rep. 672.

In *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84, it was decided that directors were liable to *bona fide* purchasers of bonds, where they had placed such bonds in the hands of an agent for sale, and had falsely and knowingly caused such bonds to be indorsed "first mortgage bonds." Compare *Allen v. South Boston R. R. Co.*, 150 Mass. 200; 15 Am. St. Rep. 185.

WILSON v. METROPOLITAN ELEVATED RAILWAY CO.

[120 NEW YORK, 145.]

CORPORATIONS.—ONE WHO RECEIVES FROM AN OFFICER OF A CORPORATION ITS NOTES OR SECURITIES IN PAYMENT OF OR AS A SECURITY FOR THE PERSONAL DEBT OF SUCH OFFICER does so at his peril. *Prima facie*, the act is unlawful, and unless authorized, the purchaser will be deemed to have taken with notice of the rights of the corporation.

WHEN A NOTE OF A CORPORATION IS MADE PAYABLE TO ITSELF, AND IS OFFERED FOR DISCOUNT BY ITS PRESIDENT, any intended purchaser is thereby subjected to the burden of inquiry whether the issuance of the note was authorized, but if an inquiry, if made, would have resulted only in ascertaining that such issuance was authorized by a resolution of the board of directors in due form, the purchaser must be regarded as a *bona fide* holder for value, though he made no inquiry, and the resolution was one which the directors unlawfully adopted to provide means for the payment of the salary of the president, to which he was not entitled.

ACTION upon a promissory note made by the defendant payable to its own order. The note in suit was issued for the purpose of providing payment of the salary of Kneeland, president and director of the defendant, under the circumstances stated in the preceding case, which case established the invalidity of the note, except in the hands of a *bona fide* holder for value.

The question in this case was, whether the plaintiff could be regarded as such holder. Judgment both by the trial court and the general term was in favor of plaintiff.

Edward S. Rapallo, for the appellant.

Francis C. Barlow, for the respondent.

PARKER, J. This court has decided at this term, in the case of *Metropolitan R'y Co. v. Kneeland*, 120 N. Y. 134, *ante*, p. 619, that certain notes, including the one in controversy, are valid legal obligations against the defendant, in favor of a purchaser for value before maturity, and without notice of the circumstances attending their issue.

It is insisted, however, that the plaintiff is not in a position to claim that he is a *bona fide* holder without notice, because the note was made by the corporation payable to itself, indorsed by Kneeland as president and individually; it was sent to him by Kneeland, through a messenger, and therefore it is said he knew when he received it that the company's note was being applied by its president to his personal benefit and advantage.

Undoubtedly the general rule is, that one who receives from an officer of a corporation the notes or securities of such corporation in payment of or as security for a personal debt of such officer does so at his own peril. *Prima facie*, the act is unlawful, and unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation: *Garrard v. Pittsburgh etc. R. R. Co.*, 29 Pa. St. 154; *Pendleton v. Fay*, 2 Paige, 202; *Shaw v. Spencer*, 100 Mass. 388; 1 Am. Rep. 115; 97 Am. Dec. 107.

The plaintiff contends that this transaction does not come within the rule to which we have alluded; that the notes were not received by him with knowledge that the discount was intended to be for the personal benefit of Kneeland, but on the contrary, they were regularly discounted in the usual course of business.

Plaintiff testified that, several months prior to the purchase, the president of the defendant spoke to him about discounting notes of the defendant. On May 26, 1884, Kneeland sent him a check of the Mercantile Trust Company for \$7,650, drawn by it, on itself, to the order of Kneeland, and indorsed by him, with a request that he cash it and hold it for a few days. Plaintiff did not agree to hold it, but paid Kneeland the face of the check. The check was retained by plaintiff

until June 27th, when Kneeland sent to him the note in suit, and two others. Plaintiff discounted the notes, and as a consideration therefor, gave Kneeland the check of the Mercantile Trust Company. After deducting the discount and interest on the money advanced on the check, the delivery of the trust company check constituted an overpayment of \$283, which amount Kneeland paid to the plaintiff the following day. And the plaintiff insists that neither in the communication from Kneeland nor in his reply thereto was it suggested that the notes were to be given or taken in payment of any indebtedness of Kneeland; that while he gave in payment a check which bore the indorsement of Kneeland, it was perfectly good without such indorsement. He could have obtained the money on it any time. It made no difference to either party whether Kneeland or the plaintiff should collect the check from the trust company. That if he had given his own check to Kneeland for the notes, and collected the other from the trust company, the effect of the transaction would not have been different from that which took place.

While this evidence is undisputed, except in so far as the plaintiff's own statements may be said to be in conflict, still, as this claim is based upon the testimony of a party to the action, the defendant would have been entitled to a submission to the jury of the question whether plaintiff understood that Kneeland was using the notes for his own benefit, instead of borrowing money thereon for the corporation.

As both parties requested the court to direct a verdict, the omission to submit the question to the jury is not now of moment. If it were necessary, in order to support the judgment, this court would be required to adopt the evidence most favorable to the plaintiff.

But assuming, as to the facts, the contention of the appellant, then we have the plaintiff paying full consideration for the notes—for the presumption is that the trust company's check was good—under circumstances which imposed upon him the burden of inquiry as to whether their issuance was authorized.

If he had made inquiry of the officers of the corporation, and through them had ascertained the fact that the notes were issued and delivered to Kneeland pursuant to a resolution of the board of directors of defendant, he would clearly be entitled to the protection of a *bona fide* holder without notice; for that resolution recited the existence of an indebtedness to

the president for salary, and expressly authorized the issue of notes in the amount thereof "to be signed by the president and countersigned by the treasurer in the usual way and form." It furnished information, therefore, that Kneeland was using the notes in the manner expressly authorized. It constituted an appearance of authority upon which a purchaser for value could safely rely. True, the resolution recited that the notes were to be issued to pay Kneeland, president, a salary, but it did not pretend to give or fix a salary. It asserted an indebtedness for salary, and one dealing with a railroad corporation which has a right to pay its president a salary, and ordinarily does, is not bound to go behind such an assertion as was made by the defendant's directors, for the purpose of ascertaining whether the salary is legally payable. A different rule would be impracticable, and would substantially incapacitate third persons from taking the paper of or contracting with corporations.

The principles enunciated in *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125, 69 Am. Dec. 678, *North River Bank v. Aymar*, 3 Hill, 262, *Exchange Bank v. Monteath*, 26 N. Y. 505, are applicable to the rule we have stated. We are of the opinion, therefore, that if plaintiff had been informed of the resolution, such information, inasmuch as it was true in fact, would afford to him the protection of a *bona fide* holder without notice.

But the plaintiff did not make inquiry at the time. He assumed that the issue and proposed disposition of the notes had been duly authorized. He trusted to the fact of authority, and not to the evidence of it. And can it be said that the resolution which would have protected him if he had been informed of it cannot be invoked to aid him now? Does the purchaser of a note, under circumstances which devolve upon him the duty of inquiry, assume a greater risk than the burden of proving that which would have protected him had he diligently inquired before making the investment? We think not. If the plaintiff had relied upon a statement by one of the officers that a resolution had been passed authorizing the issue of the notes, he would have assumed, necessarily, the risk of the statement being true. If true, it would protect him; otherwise not. He stands in no different position because he did not first inquire. In either event, he would assume only the risk of proving the authorization by resolution.

This position has support in the reasoning of Judge Andrews

in *Cowing v. Altman*, 71 N. Y. 442, 27 Am. Rep. 70, and *Williams v. Mitchell*, 17 Mass. 101.

The views expressed lead to an affirmance of the judgment. The judgment should be affirmed.

PLEDGE OF CERTIFICATES OF STOCK by one holding them as trustee is *prima facie* invalid, and the pledgee is bound to ascertain the pledgor's power to pledge them: *Fisher v. Brown*, 104 Mass. 261; *Loring v. Salisbury Mills*, 125 Mass. 151, cited in note to *Shaw v. Spencer*, 97 Am. Dec. 114. To the same effect, substantially, is *Farrington v. South Boston R. R. Co.*, 120 Mass. 406; 15 Am. St. Rep. 222.

PALMER v. DELAWARE AND HUDSON CANAL CO.

[120 NEW YORK, 170.]

CARRIERS OF PASSENGERS MUST EXERCISE THE UTMOST CARE AND PRUDENCE which human foresight can suggest to secure their safety. This vigilance, if the carrier is a railroad corporation, is to be exercised by it to see that its road, and the appurtenances used in operating it, are and remain in good condition and free from defects.

CARRIERS — LATENT DEFECT WHICH WILL RELIEVE A CARRIER OF PASSENGERS FROM RESPONSIBILITY is such only as no reasonable degree of human skill and foresight could guard against.

NEGLIGENCE — RAILROAD CORPORATIONS MAY BE HELD LIABLE FOR INJURIES RESULTING TO A PASSENGER BY THE BREAKING OF A SPINDLE of a draw-bar used to connect cars together as a train, if the evidence tends to show the existence of a flaw in such spindle, which may have been in it before it was put to use on the car. When it was made to be put on a car, the duty of the corporation was to apply all known tests to ascertain whether it was in all respects fit for the purpose it was intended to serve, and if, in consequence of the failure to do so, the defect was not discovered, and the accident occurred, the corporation is liable.

NEGLIGENCE — QUESTION FOR JURY. — Where an accident has occurred from the breaking of spindle used to connect cars in a train, and it appears that such spindle had not been inspected during the two years it had been in use, and that the removal and inspection of it were not within the system of inspection adopted by the defendant, it is for the jury to determine, under proper instruction from the court, whether the defendant had been guilty of a want of due care.

ACTION to recover compensation for damages claimed to have been suffered by the plaintiff through the negligence of the defendant. The judgments of the trial court and of the general term were in favor of the plaintiff.

Edwin Young, for the appellant.

A. J. Parker, Jr., for the respondent.

BRADLEY, J. On September 17, 1885, while going at the rate of twenty or twenty-five miles per hour, the locomotive-

engine, drawing a train upon defendant's railroad, was severed from the cars, the speed of which suddenly slackened by the operation of the air-brakes, and the plaintiff, being a passenger in one of the cars, was struck over his eye and injured by the end (said to be metallic) of the bell-rope, which, being attached to the engine, was rapidly drawn through the cars. The plaintiff had the burden of proving a state of facts from which it might be inferred that his injury was occasioned by the negligence of the defendant, and for that purpose it was made to appear that the severance of the engine from the train was caused by the breaking of the spindle of the draw-bar on the forward end of the car, next to the engine. The purpose of this bar, by means of the draw-head or coupling apparatus forming part of it, was to connect the cars together as a train, and the one next to the engine to it, and when it broke there was nothing to support the connection. There was evidence given on the trial sufficient to justify the inference of negligence of the defendant: *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258; *Edgerton v. New York etc. R. R. Co.*, 89 N. Y. 227; *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75; *Breen v. New York etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450. With a view to relief against the imputation of negligence, it was proved that the spindle, when on the car, was not accessible to observation or inspection, and the defendant gave evidence tending to prove that, for the purpose of its examination, it was necessary to put the car into the shop and take out the draw-bar, which it was not customary to do very frequently, and that the spindles and draw-heads of this car were renewed in 1883; and the reason given for not deeming it necessary to overhaul and examine this apparatus more frequently was, that it was made of the best wrought iron, and that its vibration and the strain upon it in its use are not such as to require it; that, so far as appears by the evidence, the spindle of the draw-head of a car had not been known before to break by the use made of it in running trains; and that while the period of availability of a car for use is ordinarily twenty-five years, this spindle had been in the car only two years when it gave way. If the defendant was required to exercise ordinary care only in maintaining in a condition of safety its appliances used in running its trains, it would not be chargeable, upon the facts proved, with liability for the plaintiff's injury.

But while a railroad company is not an insurer of the safety

of its passengers, it is bound to use a high degree of skill and vigilance to guard against accidents which may be attended with injurious consequences to them. This duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road, and appliances used in operating it, are and remain in good condition and free from the defects; and a latent defect which will relieve it from responsibility is such only as no reasonable degree of human skill and foresight could guard against: *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Bowen v. New York Cent. R. R. Co.*, 18 N. Y. 408; 72 Am. Dec. 529; *Brown v. New York Cent. R. R. Co.*, 34 N. Y. 404; *Caldwell v. New Jersey S. Co.*, 47 N. Y. 282; *Pennsylvania Co. v. Roy*, 102 U. S. 451.

This measure of responsibility is deemed essential to the proper protection of passengers, who must necessarily rely wholly upon the precautionary care and diligence of the carrier so far as their safety depends upon the condition of the road and the means provided for their conveyance. The evidence warranted the conclusion that the broken appliance which in the present case was the cause of the injury complained of was defective, and that if it did not become so by its use upon the car, it was so when put on it. The witnesses did not agree about its apparent condition at the time it broke. But evidence on the part of the plaintiff tended to prove that at the point where it severed there was a flaw in the spindle three fourths of an inch in depth. Such a flaw would extend nearly half-way through the spindle, which was a round bar of iron one and five eighths of an inch in diameter. This necessarily weakened it, and permitted the inference that such imperfect condition was the cause of its breakage. Assuming that this flaw existed, it is not unreasonable to suppose that it may have been in the iron when it was put on the car, and that although the car had afterward been in use on the road for two years, the spindle may not have been subjected to the peculiar strain which severed it until the time in question. When it was made to be put upon the car, the duty was to apply the known tests to ascertain whether it was in all respects fit for the purpose it was intended to serve; and if, in consequence of the failure to do so, the defect was not discovered, and the accident occurred, the defendant was responsible. That question was considered in the *Hegeman* and *Caldwell* cases, before cited.

There was some evidence tending to prove that tests might be successfully applied by skilled workers in iron to discover a flaw in a wrought-iron bar; that while this could be done when it was made, it would afterward be more difficult to do it satisfactorily to disclose a flaw concealed within it, and not coming to the surface, without impairing the bar in other respects. There was evidence warranting the inference that the flaw in this one had no surface covering. It did not necessarily appear by the evidence whether this was a flaw produced in the process of manufacture of the spindle, or a fracture resulting from its use on the car. In view of the situation, the trial court submitted to the jury the question whether the defendant had failed to perform its duty in not taking the bar out of the ear, and, by proper means, inspecting it, with a view to ascertain whether it was or remained in suitable condition for use, and to this part of the charge the defendant's counsel excepted. It may be assumed, for the purposes of the question, that no inspection had been made of this spindle during the two years it had remained on the car, and that the removal and examination of it were not within the system of inspection adopted by the defendant. The view which a carrier of passengers may have of what is or is not essential by way of inspection of its road and appliances is not necessarily conclusive, although entitled to consideration upon the inquiry whether the system is adequate to the demand of duty upon the vigilance of the company. The same degree of care and watchfulness is not alike requisite to all of the various portions of the machinery and appliances. The apparent necessity for frequency of examination is somewhat dependent upon the liability to impairment and the consequences which may be apprehended as the result of defective condition. But whether the system and the manner of its execution are all that may be required of the carrier cannot be measured by any rule of law to be applied by the court. It must, in view of the circumstances appearing by the evidence, be one of fact for the jury to determine, upon proper instructions relating to the degree of care imposed upon the company; and while it is true that the question of fact so presented is somewhat speculative in the sense that it is not measured by any definite rule, it must nevertheless become a matter of judgment, to be expressed by the jury, and founded upon the evidence. They have found that the defendant did not use that care which it should have exercised to ascertain that the draw-bar was not

in suitable condition, and that if it had performed its duty in that respect the accident would not have occurred. It cannot be said that the continuance of the connection with the engine, or with each other, of the cars of a train, is not essential to the safety of passengers, or that serious injury may not be within apprehension as the result of such disconnection while in rapid motion. It is, however, urged that the earlier rule adopted by the court as to the degree of vigilance required of a railroad company in the conveyance of passengers is not sustained by the later adjudications, and reference is made to some cases. It may be observed that those so cited do not relate to the machinery or the appliances and apparatus which constitute and sustain the operative means of conveyance and transportation, but to other structures provided by the carrier, and the manner of their construction, and to which a less degree of care is applicable. Such are the cases of *Hayes v. Forty-second Street etc. R. R. Co.*, 97 N. Y. 259; *Laffin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433; *Kelly v. New York etc. R'y Co.*, 109 N. Y. 44; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488; *Kelly v. Manhattan R'y Co.*, 112 N. Y. 443. The general doctrine of the earlier cases in this state on the subject does not seem to have been modified by the later ones, but has quite uniformly been approved, so far as applicable. *Coddington v. Brooklyn C. R. R. Co.*, 102 N. Y. 66.

The evidence was such as to present a question of fact for the jury, and to require its submission to them. We think there was no error in the portion of the charge above mentioned, and that none of the exceptions were well taken.

The judgment should be affirmed.

CARRIERS — PASSENGERS — CARE REQUIRED. — As to the care required of carriers with reference to the safety of their passengers, see *Wormsdlorf v. Detroit City R'y Co.*, 75 Mich. 472; 13 Am. St. Rep. 453, and note; and as to the degree of care exacted of carriers, see note to *Memphis etc. R'y Co. v. Stringfellow*, 51 Am. Rep. 602-606.

RAILROADS. — DUTY AS TO THE CONSTRUCTION OF ROAD-BEDS, ETC.: See *Columbus etc. R'y Co. v. Bridges*, 86 Ala. 448; 11 Am. St. Rep. 58, and note; as to the construction of vehicles and means of transportation: *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323.

NEGLECT — QUESTION FOR THE JURY. — Negligence is ordinarily a question of fact for the jury: *Dowell v. Guthrie*, 99 Mo. 653; *ante*, p. 598, and note.

VOUGHT v. WILLIAMS.

[120 NEW YORK, 282.]

VENDOR AND PURCHASER OF REAL ESTATE. — CONTRACT THAT TITLE SHALL BE FIRST-CLASS, AND SHALL BE PASSED UPON BY THE PURCHASER'S LAWYER, does not make the decision of such lawyer in favor of the title a condition precedent to the right of the vendor to enforce the contract, if in fact, beyond all dispute, the title is good.

VENDOR AND PURCHASER OF REAL ESTATE — FIRST-CLASS TITLE, WHAT IS. — Stipulation in a contract for the purchase of real estate that the title shall be first-class means nothing more than that it shall be marketable.

VENDOR AND PURCHASER OF REAL ESTATE. — EVERY PURCHASER OF REAL ESTATE IS ENTITLED TO A MARKETABLE TITLE free from encumbrances and defects, unless he expressly stipulates to accept a defective title.

VENDOR AND PURCHASER OF REAL ESTATE. — A MARKETABLE TITLE IS ONE that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, but the doubt must be such as affects the value of the land or will interfere with its sale.

A PURCHASER WILL NOT BE COMPELLED TO TAKE PROPERTY the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and if he wishes to sell it, be reasonably certain that no flaw or doubt will arise to disturb its market value.

VENDOR AND PURCHASER OF REAL ESTATE. — ONE WILL NOT BE COMPELLED TO PERFORM A CONTRACT for the purchase of real estate, if it appears that his vendor's title depends upon the death of a particular person, the only evidence of whose death is, that, twenty-four years before the trial of the case, being a young unmarried man, in feeble health and of dissipated habits, he left home, from causes unknown, and has not been seen or heard from since, and when, if still living, he is only forty-seven years of age, and there is no title by adverse possession, and the contract stipulated for a first-class title.

ACTION for specific performance of a contract for the purchase of real estate. The contract stipulated that the title to the land should be first-class, and should be passed upon by a lawyer or conveyancer to be designated by the defendant. The defendant refused to accept the property and make payment therefor, on the ground that the title was not marketable. The defect in the title was, that the property had in the year 1853 descended to Mary P. Richardson and her two sons, William H. Richardson and Giles B. Richardson. The latter was born in May, 1840, and lived with his mother until 1863, at which latter date he was unmarried, in poor health, out of business, and very dissipated. He then left home, and about a week afterwards was seen in Albany, in a destitute condition and in want of clothing, and to the person who saw him he stated he was going to Troy to procure work. He was

never afterwards seen nor heard of by any of his friends or members of his family. In 1875, his mother and brother conveyed the property in controversy to the plaintiff's grantor, claiming to have succeeded to the interest of Giles B. Richardson upon the assumption of his death. The judgments of the trial court and of the general term were in favor of plaintiff.

James B. Perkins, for the appellants.

George F. Yeoman, for the respondent.

BROWN, J. The provision that the title was to be passed upon by the defendant's lawyer or conveyancer did not make the decision of the conveyancer that the title was good a condition precedent to the right of the plaintiff to enforce the performance of the contract.

If a decision to that effect was refused unreasonably, the failure to obtain it would not defeat a recovery, and it would have been unreasonably refused if in fact, beyond all dispute, the title was good: *Folliard v. Wallace*, 2 Johns. 395; *Thomas v. Fleury*, 26 N. Y. 28; *City of Brooklyn v. Brooklyn C. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Bowery N. Bank v. Mayor etc.*, 63 N. Y. 336; *Duplex S. B. Co. v. Garden*, 101 N. Y. 388; 54 Am. Rep. 709; *Doll v. Noble*, 116 N. Y. 230; 15 Am. St. Rep. 398.

The stipulation that the title should be first-class could mean nothing more than that it should be marketable.

The trial court refused to find that Giles B. Richardson, Jr., was dead, and it did find that there was no evidence "as to whether or not he was dead, except the presumption, if any, which is raised from the facts hereinbefore stated with regard to him."

It found, as conclusion of law, "that the title of the plaintiff to said premises, depending, as it does, upon the disputed question of fact, is not a marketable title, and the defendant was entitled, because of said defect, to refuse to carry out the said contract."

It is an established principle of law that every purchaser of real estate is entitled to a marketable title free from encumbrances and defects, unless he expressly stipulates to accept a defective title: *Burwell v. Jackson*, 9 N. Y. 535; *Delavan v. Duncan*, 49 N. Y. 485.

A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some

fact appearing in the course of its deduction, and the doubt must be such as affects the value of the land or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value: *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Shriver v. Shriver*, 86 N. Y. 575; *Hellreigel v. Manning*, 97 N. Y. 56; *Fleming v. Burnham*, 100 N. Y. 1; *Ferry v. Sampson*, 112 N. Y. 415; *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844; *Swayns v. Lyon*, 67 Pa. St. 436; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

"If a title depends upon a fact which is not capable of satisfactory proof, a purchaser cannot be compelled to take it": *Shriver v. Shriver*, 86 N. Y. 575.

It was said, however, in *Ferry v. Sampson*, 112 N. Y. 415, that "the rule is not absolute that a disputable fact not determined by the judgment is in every case a bar to the enforcement of the sale. It depends, in some degree, upon discretion. If the existence of the alleged fact which is supposed to cloud the title is a possibility merely, or the alleged outstanding right is a very improbable and remote contingency, which, according to ordinary experience, has no probable basis, the court may compel the purchaser, in such a case, to complete his purchase."

In that case, the decisions of the general and special term were reversed, and the purchaser was compelled to take the title, although one to whom the property had been devised by his father's will was not shown to be dead, or if dead, that he had not left a widow or children surviving him. It was shown, however, that he had not been heard from for forty years before the trial of the action, and, if living, would have been about sixty-one years of age. If the reasoning of the opinion in the case just cited is to be applied in this case, it would lead to a reversal of the judgment appealed from. In respect only to the length of time that had elapsed since the absent owner was heard from do the cases differ.

Here we have a young unmarried man, of feeble health and of dissipated habits, leaving home from causes unknown. When last seen he was in a destitute condition, and in want of clothing, and for upwards of twenty-four years no one of his family or friends has seen or heard of him. Is it reasonable

to suppose that, if living, he would have made no effort to obtain the property that he left behind? The presumption of death does not depend on length of time alone. Here, as in *Ferry v. Sampson*, 112 N. Y. 415, there was a valuable interest in property, which, according to common experience, the owner would, if living, have probably asserted and claimed. These circumstances all point to Richardson's death, as in the case cited they indicated the death of Armstrong, the devisee.

Ferry v. Sampson, 112 N. Y. 415, is not an authority, however, for anything further than that forty years' absence, under the circumstances there proven, raised a presumption of death. In that respect it is like the case of *McComb v. Wright*, 5 Johns. Ch. 263, where Chancellor Kent made a similar ruling.

But I am not prepared to decide that a purchaser of real estate should be compelled to take title, when there is an outstanding right in a man who, if living, would be only forty-seven years of age, and of whose death there is no evidence, except the presumption arising from an absence from his friends of twenty-four years and his failure to communicate with them and to claim property which he left behind him upon his departure from home. It is very probable that the man is dead. The chances are very largely in favor of that conclusion. But his death is not proven, and the plaintiff's title to the real estate, which necessarily depends upon his death, cannot be said to be free from a reasonable doubt.

Why should we compel the purchaser to take all the risk involved in that doubt?

There is no title by adverse possession. The only act of his co-tenant hostile to his title that appears in the record before us is the deed of his mother and brother, which purported to convey the whole land in April, 1875, and if there has been adverse possession, it dates from the delivery of that deed: *Culver v. Rhodes*, 87 N. Y. 348.

No decision made in this action can bind Richardson or his descendants, if he left any. The cloud on the title would still remain, whatever decision the court might make upon the question whether Richardson was or was not living, and the title cannot be made marketable by determining that fact in this action.

In *Fleming v. Burnham*, 100 N. Y. 1, it was said: "It would be unjust to compel a purchaser to take a title the validity of which depended upon a question of fact, when the facts pre-

sented upon the application might be changed on a new inquiry or are open to opposing inferences." That statement is very applicable to this case. Richardson, or some descendant of his, might appear at any time and destroy all the reasoning built upon his absence and abandonment of his property.

The parties contracted with reference to a "first-class title." They did not rely upon the agreement which the law would imply to that effect. They expressly stipulated for it. The consideration to be paid for the land was based upon it. And the court should not compel the defendant to execute the contract, unless it is clear, beyond a reasonable doubt, that he will receive what he contracted to buy.

There must be some point of time, of course, when the presumption of death would arise, but we have been referred to no case in this state in which that presumption has prevailed where the absence was less than forty years.

We do not think that it should prevail in this case. The circumstances do not point unequivocally to Richardson's death, and the special term decided correctly in refusing to enforce the contract.

The judgment should be affirmed.

VENDOR AND VENDEE — CONTRACTS FOR SALE OF LAND — MARKETABLE TITLE. — An agreement to make a good marketable title is always implied in executory contracts for the sale of land, and the purchaser need not accept a defective title, unless he expressly stipulates to take such title with notice of the defects: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844, and note.

VENDOR AND VENDEE — CONTRACTS FOR SALE OF LAND. — What is a marketable title: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844.

McKENZIE v. HARRISON.

[120 NEW YORK, 260.]

LANDLORD AND TENANT — EXECUTED AGREEMENT TO REDUCE RENT. — If the lessor orally agrees to reduce the rent of leased premises, and to accept a less sum than stipulated for in the lease thereof under seal, and such agreement is carried out for a number of years by the payment by the tenant and the acceptance by the lessor of such rent as reduced, and the giving of the receipts therefor as in full of all rent to the date of said receipts, the lessor must be regarded as having made a valid gift to the tenant of the difference between the rent paid and that stipulated for in the lease, and cannot recover of the latter the amount so given him.

GIFT OF A DEBT. — A debt may be forgiven, and a receipt in full may be evidence of such forgiveness.

ACTION to recover balance claimed to be due for rent. The judgments of the trial court and of the general term were in favor of the plaintiff.

N. B. Hoxie, for the appellants.

Edward W. S. Johnston, for the respondents.

HAIGHT, J. This action was brought to recover the amount of rent alleged to be due and unpaid upon a lease of real estate in the city of New York. It appears that the parties had made and executed a lease under seal whereby the plaintiffs leased to the defendants the store and premises known as No. 16 Fourth Street for the term of ten years from May 1, 1877, for the annual rental of four thousand five hundred dollars, payable quarterly. Upon the trial, the defendants offered to prove, in substance, that, after they had occupied the premises for one year under the lease, and paid the rent in full for that year, that they reported to the plaintiffs that their business was very dull, and that they could not afford to pay so much rent; that, thereupon, the plaintiffs agreed to reduce the rent \$1,000 per year, making \$3,500 a year, or \$875 for each quarter; that, thereafter, the defendants, at the end of each quarter, paid the plaintiffs \$875, and the plaintiffs executed and delivered to them a receipt for that amount, in full for balance of rent due at that date, as per agreement, "until times are better"; that this continued for three years, after which the plaintiffs notified the defendants that, thereafter, they wished them to pay the amount of rent originally provided for by the lease, and that, thereafter, the full amount of rent was paid until the commencement of this action, in December, 1886. This evidence was excluded by the trial court, and a verdict ordered for the plaintiffs for the full amount claimed.

The general term was of the opinion that the case of *Coe v. Hobby*, 7 Hun, 157, 72 N. Y. 141, 28 Am. Rep. 120, disposed of the questions involved in this case. The facts in that case are very similar to those which were offered to be proved in this, but in that case the action was brought for a quarter's rent which had become due, no part of which had been paid, the lessor refusing to any longer accept the reduced amount agreed upon; and he did not seek or claim the right to recover the balance of the quarterly rents which had previously been paid in part under the agreement, and for which a receipt had been given in full. The distinction, therefore, between the two cases is apparent. In that case the lessor was seeking to

enforce the provisions of his lease, which was under seal, and collect a quarter's rent then due and owing. The lessees were defending under an executory verbal contract to reduce the rent. Whilst in this case the lessees are defending under an executed oral agreement to the effect that the rent has been paid and accepted in full and is evidenced by a written receipt given therefor.

We shall not question the rule that a contract or covenant under seal cannot be modified by a parol unexecuted contract: *Coe v. Hobby*, 7 Hun, 157; 72 N. Y. 141; 28 Am. Rep. 120; *Smith v. Kerr*, 33 Hun, 567-571; 108 N. Y. 31; 2 Am. St. Rep. 862. Neither shall we question the views of the court below, to the effect that the alleged oral agreement in this case to reduce the rent one thousand dollars per year was void and inoperative in so far as it remained unexecuted. The lessors had the right to repudiate it at any time, and demand the full amount of rent provided for by the lease; but in so far as the oral agreement had become executed as to the payments which had fallen due and had been paid and accepted in full as per the oral agreement, we think the rule invoked has no application.

The reason of the rule was founded upon public policy. It was not regarded as safe or prudent to permit the contract of parties which had been carefully reduced to writing, and executed under seal, to be modified or changed by the testimony of witnesses as to the parol statements or agreements of parties. Hence the rule that testimony of parol agreements shall not be competent as evidence to impeach, vary, or modify written agreements or covenants under seal. But the parties may waive this rule, and carry out and perform the agreements under seal as changed or modified by the parol agreement, thus executing both agreements; and where this has been done, and the parties have settled with a full knowledge of the facts, and in the absence of fraud, there is no power to revoke or remedy reserved to either party: *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475; *Lattimore v. Harsen*, 14 Johns. 329; *McCreery v. Day*, 28 N. Y. Super. Ct. 597.

So in this case, if, as is claimed, the parol agreement was made to reduce the rent one thousand dollars per year, and that agreement has been carried out and fully executed by the parties, and at the end of each quarter, when the rent by the terms of the lease became due and payable, the reduced sum as agreed upon by the parol agreement was paid, and the

parties settled upon that basis, and as evidence of such settlement the plaintiff gave a receipt in full for the amount of rent due to that date, it became executed, and the plaintiffs cannot revoke the same, or maintain this action to recover any greater sum than that settled for.

It is also claimed that the oral agreement was void for the want of a consideration. Assume this to be so, and that the plaintiffs, at any time whilst the agreement remained executory, had the right to demand the full amount of rent provided for by the lease. They, however, had the right to waive consideration, and carry out their parol agreement, and if they did this executing it, they were brought within the rule to which we have already called attention.

To illustrate: A may give B his promissory note without consideration. As long as it remains in the hands of B, A may interpose the defense that it was given for B's accommodation, and was without consideration. But as soon as A executed his promise to B by paying the note, his agreement becomes, executed and he cannot recover back the money so paid.

It may be claimed that the payment of a less sum than the admitted debt is not good as an accord and satisfaction. There are numerous authorities sustaining this doctrine. Lord Coke stated the rule to be that, where the condition is for the payment of a definite, fixed, liquidated sum, the obligor cannot, at the time appointed, pay a less sum in satisfaction of the whole, because it is apparent that the lesser sum of money cannot be a satisfaction of a greater.

This rule has been criticised as unsound and unjust in cases where the lesser sum is accepted in full satisfaction of the greater: See *Foakes v. Beer*, Co. Lit. 212 b; L. R. 1 App. Cas. 605, 614-617; *Jaffray v. Davis*, 48 Hun. 500.

Whilst in other cases the courts have gone still further, and held that the rule applied even in cases where the payment was accepted in full satisfaction, and a receipt given therefor: *Harriman v. Harriman*, 12 Gray, 341; *Smith v. Phillips*, 77 Va. 548; *Bunge v. Koop*, 48 N. Y. 225; 8 Am. Rep. 546; *Wilkeson v. Byers*, Lang. S. C. 197-201.

Under the view taken by us of this case, it does not become necessary to approve or disapprove of the doctrine promulgated in these cases; for this rule has no application when the payment is made under an agreement which is recognized as valid by the parties, and has been fully executed.

Again, a debt could be discharged at common law by executing a formal release under seal. The seal imported a consideration, and this has not been questioned by any of the cases.

There undoubtedly is a distinction between releases under seal, and an ordinary receipt given on the payment of a sum of money which is not under seal, the latter being subject to explanation and proof showing that it was given without consideration.

But even though there may not be an accord and satisfaction, there may be a gift, and the receipt may be evidence of such gift. A gift is a voluntary transfer of any property or thing by one to another without consideration. To be valid, it must be executed. There must be a delivery by the donor such as will place the property or thing given under the control of the donee, and there must be an intent to vest the title in him. Actual and personal delivery by the donor is not always necessary; for when another person is the custodian, an order of the donor to deliver to the donee may constitute a gift. It may be oral or in writing. Nor formal words or expressions are required. It is a question of intent, and the inquiry is as to what was intended by that which was said and done. A promissory note or other evidence of debt may be the subject of a gift, and the delivery of the note or of the evidence of debt is evidence tending to show an intent to give. A debt may be forgiven; and a receipt in full may be evidence of such forgiveness: 2 Schouler on Personal Property, 68-90; Bishop on Contracts, sec. 50.

In the case of *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181, the defendant was owing the plaintiff the sum of \$820. The plaintiff told him that if he would give him one dollar to make it lawful, he would give him the entire debt. Whereupon the defendant delivered one dollar to the plaintiff, who thereupon executed and delivered a receipt therefor in full to balance all accounts to date, of whatever name and nature. It was held that the executing and delivery of the receipt in full with the purpose of giving the debt was such an act that the law would construe the instrument, if necessary, as an assignment to the defendant.

This case is in point, and is controlling upon the question under consideration: See also *Ferry v. Stephens*, 66 N. Y. 321; *Carpenter v. Soule*, 88 N. Y. 251-256; 42 Am. Rep. 248.

We are therefore of the opinion that the proof offered

should have been received; that from it the jury might have found that the plaintiffs gave to the defendants the balance of the rent, for which this action was brought.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

GIFT — WHAT MAY BE GIVEN — DEBT. — A valid gift of a debt due the donor from the donee may be made by the donor by balancing the books of account, and delivering a receipt in full to the donee: *Gray v. Barton*, 55 N. Y. 68; 14 Am. Rep. 181.

CONTRACTS UNDER SEAL — MODIFICATION OF — SUBSEQUENT AGREEMENTS. — As a general rule, contracts under seal cannot be modified or abrogated by other agreements, unless the latter are also under seal: *Pratt v. Morrow*, 45 Mo. 404; 100 Am. Dec. 381; *Smith v. Lewis*, 24 Conn. 624; 63 Am. Dec. 180. But a contract under seal may be modified or defeated by an executed parol contract: *Munroe v. Perkins*, 9 Pick. 298; 20 Am. Dec. 475.

CRANE v. GRUENEWALD.

[120 NEW YORK, 274.]

PAYMENT, WHO MAY RECEIVE. — Mortgagor making payment on a mortgage to one, other than the mortgagee, does so at his peril, and must assume the burden of proving that it was made to one clothed with authority to receive it. Payment of a mortgage to one having apparent authority to receive it will be treated as if actual authority existed.

PAYMENT TO ATTORNEY. — Authority on the part of an attorney to receive payment of a mortgage exists when he negotiated the loan for the mortgagee, and the latter permitted him to retain possession of the bond and mortgage after the principal was due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, made payment to him. The mortgagee under such circumstances will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated.

PAYMENT TO AN ATTORNEY HAVING POSSESSION OF A BOND AND MORTGAGE is not invalidated by the fact that the mortgagor who made such payment did not then see the bond and mortgage, if, in response to his inquiry, he was informed that they were still in the possession of the attorney, and such information was true.

PAYMENT, PRESUMPTION OF CONTINUANCE OF AUTHORITY TO RECEIVE. — If an attorney is given apparent authority to receive payment of a bond and mortgage by the fact that he negotiated the loan, and they are by the mortgagee left in his possession, there is no presumption that this authority or possession continues; and every time the mortgagee makes a payment to such attorney, he must ascertain that the bond and mortgage remain in his possession.

PAYMENT, TERMINATION OF AUTHORITY TO RECEIVE. — Authority of an attorney to receive payment of a bond and mortgage left in his possession by the mortgagee terminates on his parting with such possession, though

he does so unlawfully, and without the knowledge of the mortgagee. The payments subsequently made to him upon his false assurance that he still retained possession of the bond and mortgage are inoperative.

ACTION to foreclose a mortgage which the defendant claimed to have paid. The loan was negotiated for the original mortgagee by an attorney named Baker, in 1875, and the bond and mortgage were made payable in December, 1880. They were left in the custody of the attorney, who was authorized by the mortgagee to receive the interest, but she never gave him authority to collect any part of the principal. After the principal became due, the attorney was by the mortgagor requested to reduce the rate of interest from seven to five per cent. The attorney consented, on condition that the mortgagor would pay three thousand dollars on account of the principal. Very soon afterwards, the mortgagor made two payments of one thousand dollars each to the attorney at his office, who each time gave receipts therefor, and exhibited the bond and mortgage. A third payment was subsequently made to the attorney, who at the time informed the mortgagor that the bond and mortgage were still in his possession, and such was the fact. Afterwards, the attorney sold the bond and mortgage, and forged an assignment thereof to one Mount, to whom they were then delivered. Still later, the mortgagor made a final payment of five thousand dollars on account of the principal, being assured by the attorney at the time of making such payment that he still had the bond and mortgage in his possession. The mortgagee afterward obtained possession of her bond and mortgage, and brought this action to foreclose the same. The trial court decided that the defendant was entitled to be credited with the first two payments of one thousand dollars each, but was not entitled to any credit for the third payment of one thousand dollars, nor to the final payment of five thousand dollars. The judgment of the trial court was affirmed by the general term.

Gibson Putzel, for the appellant.

Joseph F. Stier, for the respondent.

PARKER, J. A mortgagor who makes a payment to one, other than the mortgagee, does so at his peril. If the payment be denied, upon him rests the burden of proving that it was paid to one clothed with authority to receive it. There is, however, one exception to this general rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been

given for its receipt: *Paley on Agency*, 3d ed., 275; *Story on Agency*, sec. 98; *Williams v. Walker*, 2 Sand. Ch. 325; *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Brewster v. Carnes*, 103 N. Y. 556-564.

So if a mortgagee permits an attorney who negotiates a loan to retain in his possession the bond and mortgage after the principal is due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated that he had. This rule comprises two elements: 1. Possession of the securities by the attorney with the consent of the mortgagee; and 2. Knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It would not avail him to prove that, subsequent to a payment, he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact the existence of which was unknown to him. It is the information which he acquires of the possession which apprises him that the attorney has apparent authority to act for the principal. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance—an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney—that estops the owner from denying the existence of authority in the attorney which such possession indicates.

Now, applying that rule to the facts found by the learned trial court in this case, the attorney, Baker, negotiated the loan of eight thousand dollars, which was made to this defendant on his bond, secured by a mortgage on real estate. The mortgagor and mortgagee never saw each other. The securities were permitted to remain in the possession of the attorney. He had authority to collect the interest, but was not authorized to collect the principal, or any part of it. After the principal became due, he received from the mortgagor two payments of one thousand dollars each, on each occasion exhibiting the bond and mortgage to the mortgagor. Clearly, as to these two items, the attorney had apparent authority to receive the principal, and the mortgagor could not

deny to them the effect of payment *pro tanto* by proof that he did not have actual authority. Subsequently, and while the bond and mortgage still remained in the possession of the attorney, this defendant paid to him a further sum of one thousand dollars, to be applied as a payment on account of the principal due. True, he did not, at this time, see the bond and mortgage; but it was actually in the possession of the attorney, and the attorney so informed him. Here, then, was possession, and information of possession. It was information upon which he acted, and inasmuch as it was true, it constituted apparent authority. If it had turned out to be untrue, it could not have availed the defendant.

We see no ground for insisting that a party must actually see and examine the securities, in order to entitle him to the protection of the doctrine of apparent authority, if he have trustworthy information of the fact, which he believes and relies upon, and it shall prove to be true, there seems to be no reason why it should not avail him as well as a personal examination of the securities. It follows that the defendant should have been credited with the third payment of one thousand dollars. The remaining five thousand dollars was paid to Baker after he had parted with the possession of the bond and mortgage, and the question presented is, whether the defendant is entitled to be credited with the payments made by him while the attorney, Baker, did not have actual possession of the securities. It will be observed that Baker was not deprived of the possession by any act of Mrs. Crane. She believed that they were still in the custody of Baker. So far as she is concerned, therefore, or the plaintiff in this action, who occupies no better or other attitude, she is not in position to deny such responsibility as her conduct imposes. She cannot say that by any act of hers she is relieved from the operation of the estoppel which prevents her from denying that the first three payments of one thousand dollars each were effectual as such. If, then, the defendant is not entitled to be credited with the payments aggregating five thousand dollars, it is because he is not in a situation to insist upon the estoppel. We are of the opinion that a proper application of this doctrine of apparent authority requires us to hold that the defendant's failure to take the precaution of ascertaining whether the attorney was actually in the possession of the securities when he paid the several sums aggregating five thousand dollars deprives him of the right to assert that he was induced to make

the payments because it appeared to him that the attorney had the right to receive the money. For, as we have already observed, it cannot appear to the mortgagor that an attorney has authority to receive the principal, save where he has present possession of the securities.

Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. This knowledge he did not have; for it was not the fact. By his own wrongful act, the attorney had parted with possession, and as a necessary consequence has deprived himself of the power to longer misrepresent his authority in respect thereto to the detriment of the mortgagee. The mortgagor thereafter placed his trust solely in the assertions of the attorney, and was deceived. In so doing he was legally as much at fault as the mortgagee, who also relied upon the attorney's trustworthiness. Therefore he cannot invoke in support of his contention the doctrine of apparent authority. A rule which undoubtedly had its foundation in the equitable principle that if one of two innocent persons must suffer, he ought to suffer in preference whose conduct has misled the confidence of the other into an unwary act.

The judgment should be reversed, and a new trial granted, with costs to the appellant, unless within thirty days the plaintiff stipulates to modify the judgment by deducting therefrom \$104.50, that being the amount of the costs of general term, and the further sum of one thousand dollars, with interest thereon from July 1, 1882, to the date of entry of the judgment, together with any other sum paid by Gruenewald to Baker, whether for principal or interest, prior to July 20, 1883, for which he was not credited by the trial court, in which event the judgment as modified is affirmed, with costs of this court to the appellant.

POTTER, J., dissented from the foregoing judgment. In his opinion, under the circumstances, the leaving of the bond and mortgage in the possession of the attorney was equivalent to the giving to him of a power of attorney to collect and receipt for the principal at any time after it should fall due, and such constructive power of attorney would continue to invest the attorney with such authority until it should be revoked by the mortgagee; and that as the mortgagee had never revoked it at any time prior to the receipt

by the attorney of full payment of the mortgage, all payments made by him should be treated as made under authority granted to him and never revoked, and therefore that judgment should have been in favor of defendant, denying the plaintiff any relief whatsoever.

PAYMENT. — Payment to an agent, who has neither possession of the security nor express authority to receive the payment, is not good: *Smith v. Kidd*, 68 N. Y. 130; 23 Am. Rep. 157; *Dickson v. Wright*, 59 Miss. 585; 24 Am. Rep. 677; *Bristol Knife Co. v. Bank*, 41 Conn. 421; 19 Am. Rep. 517; *Doubleday v. Kress*, 60 N. Y. 410; 10 Am. Rep. 502; *Curtis v. Phoenix Ins. Co.*, 78 Cal. 619.

AGENCY — PAYMENT. — Payment to an agent is binding upon the principal only to the extent of the agent's authority to receive payment: *Martin v. United States*, 2 T. B. Mon. 89; 15 Am. Rep. 129, and note.

BRICKELL v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[120 NEW YORK, 290.]

CONTRIBUTORY NEGLIGENCE IN CROSSING RAILWAY TRACK — BURDEN OF PROOF. — One who is injured by collision with a railway train at a crossing must, to entitle him to recover for the injuries sustained, establish his freedom from contributory negligence by showing that he approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger.

DRIVER OF VEHICLE, NEGLIGENCE OF. — One injured at a railway crossing, while riding in a vehicle driven and owned by another, cannot recover of a railway company for such injuries, where he, as well as such driver, was negligent in not making any effort to ascertain whether or not a train was approaching.

ACTION to recover damages sustained by plaintiff from collision between a wagon in which he was riding and a locomotive at a highway crossing. The plaintiff was in a buggy-wagon, which was owned and driven by another person, whom the plaintiff had hired to carry him from a station on the Central road to Palmyra. It was necessary to cross the track of the West Shore railroad. At the time, it had been snowing, and the wind was blowing; the top of the buggy was raised and closed, except in its front, which was toward the crossing. The railroad could be seen for a good distance at many points on the road, and particularly at the south end of a bridge, which must be crossed to reach the crossing where the collision took place, which was a distance of one or two hundred feet from the bridge. After leaving the bridge, neither the plaintiff nor the driver made any further effort to learn whether the train was approaching, but drove in a brisk

trot until within thirty yards of the crossing, when the sound of an approaching train was first heard. Judgment, rendered in favor of the defendant at the trial court, was affirmed by the general term.

C. H. Sedgwick, for the appellant.

M. M. Waters, for the respondent.

POTTER, J. The evidence in this case indicates to my mind, not merely a failure to show that absence of freedom from contributory negligence which is necessary to be shown upon the behalf of the plaintiff in order to sustain a recovery for negligence upon the part of a railroad company, but clearly and beyond any question the actual existence of negligence of the driver and of the plaintiff, which contributed to the plaintiff's injury. The excuse attempted to be set up for such conduct, that the top of the buggy and the snow and wind rendered it more difficult to hear the noise of an approaching train, seems to prove and emphasize their carelessness and want of attention in making an effort, under those circumstances, to learn there was no train approaching the crossing. They well knew of this condition of things, and of the location and surroundings of the crossing, and that they were called upon to use more than ordinary prudence in effecting the crossing under such circumstances.

The general rule in this class of cases is, that the burden of establishing affirmatively freedom from contributory negligence is upon the plaintiff, or, in the language of the opinion in *Tolman v. Syracuse etc. R. R. Co.*, 98 N. Y. 202, 50 Am. Rep. 649, that "plaintiff approached the crossing where the collision and injury occurred with prudence and care, and with senses alert to the possibility of approaching danger."

And this rule obtains even where the railroad company neglects to ring its bell or sound its whistle as required when its trains approach a crossing: *Cullen v. Delaware & H. C. Co.*, 113 N. Y. 668.

Nor do I think that this rule is to be relaxed in favor of the plaintiff because of the fact that he was being carried in a vehicle owned and driven by another. The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from the driver by an

inclosure, and is without opportunity to discover danger, and to inform the driver of it: *Robinson v. New York Cent. etc. R. R. Co.*, 66 N. Y. 11; 23 Am. Rep. 1.

It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and avoid it if practicable.

The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing, and environments, and with at least the same, if not better, opportunity of discovering dangers that the driver possessed, and without any embarrassment in communicating them to him.

The rule in such case is laid down in *Hoag v. New York Cent. etc. R. R. Co.*, 111 N. Y. 199, where husband and wife were sitting upon the same seat in a vehicle driven by the husband, and both were killed by a collision at a crossing, and in an action brought by the administratrix of the wife against the railroad company it was held "that she had no right, because her husband was driving, to omit some reasonable and prudent effort to see for herself that the crossing was safe." "She was bound to look and listen."

The judgment should be affirmed, with costs.

NEGLIGENCE. — Where the driver of a vehicle and his passenger are concurrently negligent, neither can recover: Note to *Village of Carterville v. Cook*, 16 Am. St. Rep. 254; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733; *Allen v. Maine C. R. R. Co.*, 82 Me. 111.

CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — As to the burden of proof in establishing the defense of contributory negligence, see note to *Prideaux v. City of Mineral Point*, 28 Am. Rep. 563-565; compare also note to *Tobman v. Syracuse etc. R. R. Co.*, 50 Am. Rep. 653-656.

ODELL v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[120 NEW YORK, 822.]

EMPLOYEE HAVING FULL KNOWLEDGE OF THE EXISTENCE OF A DEFECT IN MACHINERY, and continuing its use until the happening of an accident chargeable to the defect, and by which he is injured, cannot recover of his employer therefor.

William H. Robertson, for the appellant.

Martin J. Keough, for the respondent.

PARKER, J. The action was for injuries sustained by plaintiff while in the employ of the defendant.

For some months prior to the accident, plaintiff had been engaged in the operation of sawing-machines in defendant's car-shops at West Morrisania. The injury resulted from the unexpected starting of the machinery while plaintiff was engaged in changing saws. It is alleged that the starting was occasioned by the fact that the square bolt or pin which holds the weight or binder from the belt, called the lever-pin, had become so nearly round by frequent use that it slipped out of the square slot into which it was entered, thereby causing the weight or binder to drop upon the belt and start the saws.

The defendant's evidence tended to show that the plaintiff, having full knowledge of the existence of the defect complained of, nevertheless continued to use the machinery until the happening of the accident. If such were the fact, defendant is not chargeable with the consequences resulting therefrom: *Powers v. New York etc. R. R. Co.*, 98 N. Y. 274; *Monaghan v. New York etc. R. R. Co.*, 45 Hun, 113.

But upon this point the evidence was conflicting, and thus was presented a question of fact for the jury.

The counsel for the defendant, at the close of the charge, requested the court to instruct the jury "that if the plaintiff knew or had notice that the machine was out of order, and with this knowledge placed his left hand upon the saw, that the placing of his hand upon the saw, with this knowledge and under the circumstances, constitutes contributory negligence, and the plaintiff cannot recover."

The request was denied, and an exception taken.

Inasmuch as the court had omitted to instruct the jury upon this subject previous to the making of the request, the refusal to charge as requested was error: *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; 10 Am. Rep. 417; *Gibson v. Erie R'y Co.*, 63 N. Y. 449; 20 Am. Rep. 552.

The judgment should be reversed.

BRADLEY, J., dissented. He claimed that the question whether the plaintiff was chargeable with contributory negligence was one of fact, and was submitted to the jury, and that the court charged them that if the plaintiff had notice of the defect in the machinery, and continued to operate it, that was a very important fact for them to consider in determining the question of his contributory negligence; that there appeared to have been a particular defect in a certain bolt or pin, which caused the machinery to start, and set the saw in motion; that the plaintiff testified that he had no notice of this particular defect, although he admitted that he had discovered the machinery, as he expressed it, was a little shakily, and that he had called the atten-

tion of the foreman especially to it. The plaintiff therefore may have had notice that the machinery was out of order without having any notice of the defect which permitted the machinery to start and put the saw in motion, or of the defective condition which rendered it dangerous for him to place his hand where he did at the time he received the injury.

MASTER AND SERVANT — LIABILITY TO SERVANT — DEFECTIVE MACHINERY. — The servant assumes the risk of defective machinery when he knows of the defects, but continues to work: *Piedmont etc. Co. v. Patterson*, 84 Va. 747; *Richman v. Stotte*, 120 Ind. 314; note to *Richmond etc. Ry Co. v. Norment*, 10 Am. St. Rep. 835, 836; compare *Keas v. Detroit etc. Mills*, 66 Mich. 271; 11 Am. St. Rep. 492, and note.

DE MELI v. DE MELL

[120 NEW YORK, 485.]

RESIDENCE of parties, within the meaning of the statute of New York requiring action for separation between husband and wife to be commenced where they reside, is the place of their permanent abode as distinguished from their place of temporary residence. Every person must be deemed to have a domicile, and until another is acquired elsewhere, to retain the domicile of his origin.

RESIDENCE IS SYNONYMOUS with inhabitancy or domicile, in legal phraseology.

WITNESSES — WIFE'S RIGHT TO TESTIFY IN HER OWN BEHALF, AND AGAINST HER HUSBAND. — Though the statute declares that a husband or wife is not competent to testify against the other upon the trial of an action founded upon an allegation of adultery, except to prove the marriage, a wife who brings an action against her husband, based partly upon his cruelty in circulating against her unfounded charges of marital infidelity, is not precluded from testifying to the falseness of such charges by the fact that the husband files a counterclaim in the same action, in which he makes the same charges against her, and seeks affirmative relief therefor. Her right to so testify exists, though the court ultimately decided that the husband, at the time of circulating the charges, acted upon information he believed to be true, and thus relieves him of the imputation of maliciously making them.

JURISDICTION OF COURTS. — A COURT HAS NO EXTRATERRITORIAL JURISDICTION, AND A PERSON NOT DOMICILED in a state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its courts by appearing in some manner in the action or proceedings sought to be instituted against him.

DECREES OF DIVORCE GRANTED IN A FOREIGN COUNTRY, IN WHICH DEFENDANT DID NOT RESIDE, IN AN ACTION TO WHICH HE DID NOT APPEAR, AND IN WHICH PROCESS WAS NOT PERSONALLY SERVED UPON HIM WITHIN SUCH COUNTRY, IS VOID.

ACTION by a wife against her husband for separation, on the ground of his cruel and inhuman treatment of her. The defendant interposed a counterclaim, alleging abandonment of

him by the plaintiff, and also that she had been guilty of adultery. The trial court decided neither entitled to relief, and both thereupon appealed.

John E. Parsons, for the plaintiff.

Herbert B. Turner, for the defendant.

BRADLEY, J. The parties were married at Dresden, in the kingdom of Saxony, in March, 1870, and in October, 1881, plaintiff at that place left her husband, came to New York, and in March, 1882, commenced this action for separation by obtaining an order for publication of the summons and causing the summons, with the complaint, to be personally served upon the defendant in the city of Dresden, Germany. The defendant, by his answer, denied that he was a resident of the state of New York at the time of the commencement of the action, and alleged that the court was without jurisdiction of its subject-matter. But with a view to affirmative relief, he added that in the event it should be determined that he was then a resident of this state, his allegation to that effect should be effectual to support his answer in that respect, setting forth his counterclaims. The plaintiff gave much evidence, with a view to establish the alleged cruel and inhuman treatment of her by the defendant, and the evidence of the latter tended to controvert, in the main, that given by her in that respect. And the evidence on the part of the defendant bearing upon his alleged counterclaims, so far as it tended to support the charges made against her, was in conflict with that given on the part of the plaintiff to meet it.

The findings of fact by the trial court relating to the charges and counter-charges of the parties were supported by evidence, and the conclusion necessarily followed that neither party was entitled to relief upon the issues presented for trial. And none of the exceptions to the conclusions of the court, and to the refusals to find as requested, other than that relating to the place of residence of the defendant at the time of the commencement of the action, require any further consideration on this review. The facts quite fully appear in the opinion of Judge Rumsey at special term: 67 How. Pr. 20. The court found that at the time of the marriage, in Dresden, Saxony, and since then, to and including the time of the commencement of this action, both of the parties were and continued to be residents of the state of New York. It must be

to repel the presumption that when the testator went to Paris, and made that his place of residence, he did not intend to change his domicile to France. His act and intent, as so manifested and unqualified, indicated his purpose to do so, and such may have been the apparent relation of the defendant to Germany, if nothing had appeared to the contrary.

The defendant was at liberty to allege in his answer facts by way of counterclaim, and seek affirmative relief against the plaintiff for separation or dissolution of his marriage with her. (Code, sec. 1770.) He did, for the purpose of seeking a divorce from her, allege that she had committed adultery with one Baron Heino Von Geyso at Eger, in Bohemia, at Dresden, in Saxony, and at other places in Europe, which she, by her reply, denied. At the time of the trial, and prior to its amendment, in 1887, the statute provided that "a husband or wife is not competent to testify against the other upon the trial of an action . . . founded upon an allegation of adultery, except to prove the marriage." (Code, sec. 831.) The plaintiff was, then, incompetent to testify upon that issue. Her action for separation, however, was not founded upon any allegation of adultery, and she was competent to testify in support of her alleged cause of action, and to any matter essentially within the issue tendered by the allegations of her complaint. As part of her cause of action, the plaintiff alleged that after she left Dresden the defendant declared his purpose not to permit the plaintiff to return to him if she wished so to do; and that to justify his action towards her he had undertaken to impeach her chastity by charging that in 1880 and 1881 she was guilty of adultery, and that the accusation so made by him became circulated amongst her friends at Dresden; and that such charge was wholly without foundation, and was made by the defendant for the purpose of injuring the plaintiff. In his answer, the defendant denied those allegations. After the subject of the alleged charges so made by the defendant against the chastity of the plaintiff had been referred to on the trial, and evidence had been given on her part to the effect that the defendant had made to others the accusation that the plaintiff had committed adultery with Baron Von Geyso, and before the defendant had given evidence tending to support the charge, the plaintiff testified that, during the period of time within which it was charged by the defendant that she met Von Geyso at Eger, she visited that place on one occasion only, when she drove there from Frazensbad, where she was

hen staying, and returned to the latter place in one afternoon, and in answer to a general question, she testified that there never had been any impropriety of any kind between Baron Von Geyso and herself.

Exception was taken by the defendant's counsel to this evidence, on the ground that the plaintiff was incompetent to testify on that subject. And after the evidence had been given on the part of the defendant tending to support the charge of adultery, the plaintiff was recalled as a witness in her own behalf, and asked this question by her counsel: "I asked you, before the examination of the Eger witnesses, whether you were at Eger under the circumstances stated, and you said, 'No'; do you still stand by that testimony?" To which, after objection and ruling were made, she answered, "I do," and exception was taken. As has been already observed, the accusation of unchastity of the plaintiff, made by the defendant, was a subject of her complaint and of proof in the action. And the defendant could not, by setting up a counterclaim founded upon the charge of adultery deny to the plaintiff the right to testify on that subject, so far as it was relevant to the matter of her alleged cause of action, although it was not competent for her to testify to like matter upon the issue arising out of the alleged counterclaim. The charge made and reported by the defendant was a serious one, and if maliciously made, was properly the subject of complaint and proof by the plaintiff as auxiliary to the other matters alleged by her in support of the cause for separation founded upon the charge of cruel and inhuman treatment: *Whispell v. Whispell*, 4 Barb. 217; *Kennedy v. Kennedy*, 73 N. Y. 369. And although such accusation was made by the defendant after the plaintiff left him, it, if made without any reasonable cause, might furnish some evidence legitimately bearing upon his feeling toward the plaintiff, and thus characterize somewhat his treatment of her as she represented it, while she remained with him. Whether the evidence, as a whole, was sufficient to justify the relief she sought in the action was for the court to determine after the close of the evidence. And until then the court could not properly determine what weight any particular evidence might be entitled to. It was sufficient for the purposes of its admissibility that it may have had some bearing upon the issue presented for trial, either directly, or in impairing the weight of any evidence given against her upon that issue. And in that view, it was unimportant whether it was introduced before or after the

defendant had put in his evidence tending to support his alleged counterclaim. While the testimony referred to of the plaintiff was not admissible upon the counterclaim, it cannot well be said that it was not so as bearing on the question of the defendant's good faith in making the accusation against her in the action she was prosecuting, and as to that, and for that purpose only, it must be deemed to have been received and considered. The court finally concluded that the defendant had information which induced him to, and he did, believe when he made the charge of unchastity of the plaintiff that it was well founded, and thus relieved him from the imputation of maliciously making it. There was evidence tending to support that view of the court, and whatever force may have otherwise been given to the evidence upon that subject, or to which it would have been entitled, is not a question now for consideration. The reception of the evidence of the plaintiff was not error.

The defendant's counsel offered in evidence what purported to be a judgment of the royal circuit court, second civil division, in Dresden, Germany, in which the defendant here was plaintiff, and this plaintiff was defendant, granting on behalf of the former a divorce in July, 1883, and to the ruling of the court excluding it exception was taken. It may be assumed, for the purposes of the question, that the proceeding or action was instituted and conducted according to the law of Germany, and in that view, if their domicile was there, the court had jurisdiction, although the defendant in it was then absent from the empire, and did not in any manner appear in the action or proceeding. In such case, a party whose domicile is in a country is subject to its laws; and jurisdiction of his person, as well as of the subject-matter, may be acquired by the court by means of substituted service in the manner provided, if provision for such purpose is made by its laws, although the party sought to be charged by an action brought against him is then absent from the country, and cannot be personally served with process within it: *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *Huntley v. Baker*, 33 Hun, 578, and cases there cited. But a court has no extraterritorial jurisdiction, and a person not domiciled in the state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted

gainst him: *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *Dunn v. Dunn*, 4 Paige, 425; *Ableman v. Booth*, 21 How. 506; *Bischoff v. Wethered*, 9 Wall. 812; *Ralston's Appeal*, 93 Pa. St. 133.

At the time the suit was commenced the plaintiff was in New York. There was no personal service of any process upon her in Germany, and the fact appears by the record that she did not appear in that suit. Assuming that the plaintiff's domicile was not in that country at the time the suit there was instituted, the court had no jurisdiction of her person, and the judgment as against her was a nullity. It is unnecessary to consider further the record of the judgment or the manner of its authentication, or how her relation to that country was affected by the continued residence of her husband in Germany, since the trial court found that the parties were residents of the state of New York. Upon that question the record referred to could have no bearing or relevancy, and therefore it was entitled to no consideration as evidence for any purpose. If the court had found the fact otherwise, the complaint in this action would necessarily have been dismissed.

Attention has been given to all the exceptions, and none of them seem to have been well taken.

The judgment should be affirmed.

DOMICILE — PERMANENT ABODE. — What constitutes domicile: See note to *White v. Tennant*, 13 Am. St. Rep. 903; *Pearce v. State*, 1 Sneed, 63; 60 Am. Dec. 135; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530; *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502; *Belmont v. Vinalhaven*, 82 Me. 525; *People v. Platt*, 117 N. Y. 160; *Canton v. Simsbury*, 54 Conn. 86; *New Hartford v. Town of Canaan*, 54 Conn. 39; *Hartford v. Champion*, 58 Conn. 268.

DOMICILE — RESIDENCE. — The word "residence" is synonymous with domicile, in legal phraseology: *Langdon v. Dowd*, 6 Allen, 423; 83 Am. Dec. 641; *People v. Platt*, 117 N. Y. 159. "Residence" necessarily involves the idea of local habitation or place of abode: *Pells v. Snell*, 130 Ill. 370. A man may be a resident of one place and a commorant in another at the same time: *Pullen v. Monk*, 82 Me. 412; *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423, and note.

WITNESSES — HUSBAND AND WIFE — WIFE'S RIGHT TO TESTIFY IN DIVORCE PROCEEDINGS. — A wife may testify against her husband in an action between them for divorce: Note to *Chamberlain v. People*, 80 Am. Dec. 258, 259; *Gilpin v. Gilpin*, 12 Col. 504.

JURISDICTION. — State laws have no extraterritorial effect, and no state can extend its process beyond its territorial limits to subject either persons or property to its judicial decisions: *Dearing v. Bank of Charleston*, 5 Ga. 497; 48 Am. Dec. 300; *Masterson v. Little*, 75 Tex. 682. A personal judgment rendered against one, in a sister state, upon notice to defendant by mere publication, there being no appearance of the defendant, is null and void outside the state in which it was rendered: *Latimer v. Union P. R'y Co.*, 43 Mo. 105; 97 Am. Dec. 378.

DENNIS v. MASSACHUSETTS BENEFIT ASSOCIATION.

[120 NEW YORK, 496.]

MUTUAL BENEFIT ASSOCIATION — CONSTRUCTION OF FORFEITURE CLAUSE IN

CERTIFICATE OF MEMBERSHIP. — A clause in a certificate of membership in a mutual benefit association, that a notice of assessment shall be sent to each member by mail, "and if the assessment is not received within thirty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the party has determined to terminate his connection with the association, which connection shall thereupon terminate, and the party's contract with the association shall lapse and be void; but said party may again renew his connection by a new contract made in the same manner as the first; and for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated, by paying assessment arrearages,"—does not

- vest in the officers of the association an arbitrary power to determine what shall be a valid excuse, but imposes on them the duty of accepting an excuse if valid; and if the excuse for not complying with the notice is, that the member, within the time allowed him in which to make payment, was stricken with apoplexy, and thereby rendered unconscious, in which condition he remained until his death, such excuse must be regarded as valid and sufficient, and the beneficiary under the certificate has the right, after the death of the member, to tender payment of the delinquent assessment and insist on his reinstatement.

INSURANCE. — RIGHT OF AN INSURED TO BE REINSTATED DOES NOT DIE WITH HIM, but passes to the beneficiary under the policy.

ACTION to recover upon a certificate of membership in the defendant association issued in August, 1883, to J. F. Dennis, and agreeing, in the event of his complying with the rules and regulations of the defendant, to pay to Annie C. Dennis, within sixty days after proof of his death, a sum equal to the amount received from a death assessment, but not to exceed five thousand dollars. The rules of the defendant required each member, upon receiving notice of the death of a member, to pay to defendant's treasurer an assessment of \$6.75, and that the notice announcing each death assessment should be sent by the association to the last post-office address of each member. The clause in the certificate of membership regarding forfeiture upon non-payment of a death assessment is stated in the *syllabus* above. A notice was mailed to the decedent, Dennis, on the thirteenth day of February, 1886, requiring him to make payment of a death assessment on or before the 15th of March ensuing. On the 8th of March the decedent was suddenly stricken with apoplexy, rendering him speechless and insensible, in which condition he remained until the 19th of March, on which day he died. On March 20th a second notice was received from defendant, in all respects like the first,

except there was stamped upon it in red ink the following: "Certificate for non-payment may be renewed by immediate payment, if in good health." The trial court directed the jury to render a verdict in favor of defendant.

John A. Mapes and J. K. Hayward, for the appellant.

Treadwell Cleveland, for the respondent.

PARKER, J. If the certificate in question had provided, without qualification, that, for a failure to pay an assessment within thirty days after the mailing of a notice thereof by the defendant, it should "lapse and be void," its invalidity would be established beyond dispute: *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 180; *Evans v. United States L. Ins. Co.*, 64 N. Y. 304. And the fact that Dennis was prevented from making payment by an act of God which deprived him of consciousness would not relieve him from a forfeiture thus provided for: *Wheeler v. Connecticut M. L. Ins. Co.*, 82 N. Y. 543; 37 Am. Rep. 594. But the question here presented is, whether the contract does not fairly admit of a construction which gives to it, after the expiration of thirty days, where a member intends and desires to pay, conditional life, which continues until it shall be determined whether he had sufficient excuse for the omission; and if such a construction be permissible, whether Dennis's severe visitation and subsequent unconscious condition constitute such an excuse as, coupled with an intention to pay, and subsequent payment, would continue the policy in force.

Judge Peckham, in *Holly v. Metropolitan L. Ins. Co.*, 105 N. Y. 437, stated the rule which should govern courts in construing contracts involving a forfeiture, as follows: "A strict construction, it is said, must be insisted upon, and the contract, resulting in a forfeiture, cannot be extended beyond the strict and literal meaning of the words used. This is undoubtedly true. In cases where the meaning is not entirely plain, and where it is capable of two constructions, one involving a forfeiture, and the other being fair and reasonable and supporting the obligation of the policy against the insurer, that construction is preferred by the courts which does not involve the forfeiture, not only because it is not so harsh, but also because, if the language is doubtful, it is that employed by the insurer, and should be taken most strongly against him."

By the seventh condition of the certificate, forfeiture is

made to depend upon "a failure to comply with the rules of said association as to payment of assessments." The second and third rules have reference to assessments and their payments.

Rule 2 provides that "upon the death of any member, the said party to whom this certificate is issued shall at once pay, if required, to its treasurer, an additional assessment of \$6.75."

This rule need not be considered, because the defendant did not require Dennis to pay at once.

By the terms of the notice, he was expressly given until March 15th following, within which to make payment.

And the notice was in accordance with the provisions of rule 3, which provided, among other things, that "if the assessment is not received within thirty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the association, which connection shall thereupon terminate, and the party's contract with the association shall lapse and be void; . . . or for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated, by paying assessment arrearages."

The right of the defendant to insist upon a forfeiture could not be doubted were it not for the last clause of the sentence quoted. By it is suggested the inquiry, What was the intent of the defendant in adding this apparently qualifying clause? How did it suppose the persons solicited to become members would interpret it? Certainly, it did not expect them to understand it as giving added strength to the provision declaring a forfeiture. It is equally clear that it was intended to be understood as softening somewhat the extreme rigor of the forfeiture clause, which, standing alone and unqualified, would deprive a member of the insurance for which he has contracted and paid, even when by an accident of mail carriage the notice of assessment has failed to reach him, or because of the act of God he has been prevented from making payment within the time prescribed.

It cannot be doubted that it suggests, at least to the average reader, that the company has agreed to accept a valid excuse for non-payment of an assessment within the thirty days, and thereafter continue the policy in force. It is wholly meaning-

less and a snare, if that be not the intent. That it was intended to have that effect has support in the provision that failure to pay within thirty days "shall be accepted and taken as sufficient evidence that the party has decided to terminate his connection with the association."

It will be observed that the contract does not provide, in terms, that failure to pay within thirty days shall work a forfeiture, but that failure to pay shall be taken as sufficient evidence of an intention to terminate his connection with the association, which connection shall thereupon terminate. Thus it is suggested that it is the intention, coupled with the failure to pay, which works the forfeiture. This language, therefore, seems to be in harmony with the last clause of the sentence. For as intention constitutes one of the essential elements of a forfeiture, so if a party intending to pay, but fails, for a valid reason, "such as a failure to receive notice of an assessment," he may be reinstated. No new contract is required. Nothing, in fact, need be done but pay the assessment, if the excuse be accepted. Giving to all the words of the contract their full and proper meaning, as the defendant must have supposed they were understood by the promisee, they cannot, as we think, be construed otherwise than as limiting and making conditional the forfeiture which would otherwise result from a failure to pay the assessment within the time prescribed. "It is a rule of law, as well as ethics," says the court in *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 413, 88 Am. Dec. 337, "that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee." The defendant not only had reason to expect that its members would interpret the contract as we have suggested, but it has also, by subsequent transactions, given to the contract a practical construction to the same effect.

Although the greater number of assessments were paid by Dennis promptly, still, three assessments were not paid until after the due date. No other act was required or thing done to continue the policy in force, except to pay the overdue assessments. And after he was in default on account of the assessment in question, and on March 19th, the defendant mailed to him a notice that he could be reinstated, "if in good health."

By this act, the defendant indicated that it understood the

policy to have conditional life remaining, because no new contract was required or suggested; the mere payment of the overdue assessment, said the defendant, in effect, will support its vitality until another assessment shall be due and payable.

Such notice cannot be treated as a waiver, because it must be considered in its entirety, and thus regarded; waiver was conditioned on the good health of Dennis,—a condition that the defendant could not impose, if reinstatement, under the circumstances, was a matter of right, because it was not so written in the contract.

Was it a matter of right? Had Dennis, instead of dying, regained consciousness on the nineteenth day of March, could he have compelled the defendant to accept the excuse he had to offer, and continue his policy in force on payment of the back assessment?

We have said that the contract must be construed as an agreement that a member may be relieved from the effect of forfeiture for valid reasons to the officers. Had he then established, by evidence,—1. That he had fully intended to pay; 2. That he was prevented, by sudden illness depriving him of consciousness; 3. That he had tendered payment,—what valid objection could have been interposed to the granting of a decree declaring the policy in full force and virtue?

It could not be urged that an act of God which instantly prostrates a man both physically and mentally does not constitute a legal excuse for the omission to do an act, when the making and acceptance of a valid excuse therefor is distinctly contracted for.

This assertion finds support in *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; 4 Am. Rep. 675.

But it is said that the agreement vests the right to determine whether the excuse be valid in the officers of the defendant; that the manner in which they exercise their power is not open to review in the courts. In other words, that the officers may arbitrarily refuse to accept any excuse whatever. If that were true, then failure to receive a notice of assessment, notwithstanding the fact that it is specifically referred to, might be arbitrarily held to be insufficient as an excuse, and the party left without redress. But such is not the law. The word "valid," as here used, is equivalent to good, sufficient, or satisfactory, and is not without judicial construction. In

Duplex S. B. Co. v. Garden, 101 N. Y. 387, 54 Am. Rep. 709, the defendants agreed to pay as soon as they "were satisfied that the boilers, as changed, were a success"; and in an action to recover the contract price, the defendants contended that, by the stipulation, it was for them alone to determine whether the boilers were a success. This position was held to be untenable, because "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded." Judge Folger, in *Miesell v. Globe Mut. L. Ins. Co.*, 76 N. Y. 115, states the rule as follows: "That which the law will say a contracting party ought to be satisfied with, that the law will say he is satisfied with." This principle is further illustrated and applied in *Folliard v. Wallace*, 2 Johns. 395; *City of Brooklyn v. Brooklyn C. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469; *Braunstein v. Accidental D. Ins. Co.*, 1 Best & S. 782; *Moore v. Woolsey*, 4 El. & B. 243.

We are of the opinion, therefore, that, had Dennis established the three propositions which we have stated, he would have been entitled to a judgment declaring the certificate in full force.

The death of the assured did not alter the contract obligations of the defendant. Dennis's legal right to reinstatement, or to have the certificate declared to be in force, did not die with him, but passed to the beneficiary under the policy. In *Wheeler v. Connecticut M. L. Ins. Co.*, 82 N. Y. 543, 554, this court held that, "although the insured was dead, the right to a paid-up policy, or its value, remained to his assignees. If the insured had lived, he was entitled to it, and his assignees succeeded to his right."

The complaint in this action is appropriate to the relief sought to be obtained.

From the evidence, it appears that the reason for non-payment was properly presented to the defendant; the amount of the assessment tendered, and the validity of the policy insisted upon; but the defendant refused to accept the reason given as valid or sufficient, and insisted that the certificate had been forfeited.

We think the evidence as to the intention of Dennis to pay the assessment properly presented a question for the jury. But it cannot avail the defendant, as it waived its right in that regard, by requesting the trial court to direct a verdict in its favor.

The order appealed from should be affirmed, and judgment absolute on defendant's stipulation ordered, with costs.

IN THE CASE OF *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276, 4 Am. Rep. 675, where a policy of life insurance was issued on the life of H., containing a provision that no insurance should be binding until actual payment of the annual premium, and H. paid the premium for several years, but on the day when the annual premium was due, and while on his way to pay it, he was taken sick, and died, and within a few days afterwards, the premium was tendered by the wife of H., but refused by the company, in an action upon the policy, the company was adjudged liable, it appearing that there was a usage on the part of the company to receive premiums within a reasonable time after due.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

DAVIS v. ELY.

[104 NORTH CAROLINA, 16.]

EQUITY — REFORMATION OF CONTRACTS. — A WRITTEN EXECUTORY CONTRACT FOR THE SALE OF LANDS CANNOT BE REFORMED BY ENLARGING IT through the aid of parol evidence, so as to include lands not embraced within its descriptive words.

SUIT for reformation of a contract. The complaint asserted that on the twenty-second day of April, 1882, the plaintiff and the defendants entered into a contract with regard to the sale and division of the Great Park estate, and that the paper purporting to contain the terms of the contract was executed by Timothy and Hannah Ely, by their agent, Harvey Terry, and the plaintiff by his agent, William J. Griffin. It was claimed that the contract, as reduced to writing, did not conform to the real agreement between the parties in this, that it failed to reserve to the complainant, Davis, a portion of the Great Park estate known as the Hall tract, and that the omission of this reservation from the contract was due to the false and fraudulent representation made to the draughtsman thereof by the defendants. When the plaintiff offered evidence to show the fraud alleged in his complaint, the defendants objected to such testimony, unless it was introduced for the purpose of rescinding the contract. The counsel for plaintiff disclaimed any such purpose, and stated that the testimony was offered solely for the purpose of obtaining reformation of the contract. The testimony was excluded by the court. Thereupon the plaintiff submitted to a nonsuit, and appealed.

C. W. Grandy, for the plaintiff.

Harvey Terry, for the defendants.

SHEPHERD, J. There is a hopeless conflict of authority upon the question whether a court of equity will correct an executory contract on the ground of fraud or mistake, and enforce it with the variation.

In England, and several of the American states, such relief is denied, although a defendant, for the purpose of resisting specific performance, may show that, by fraud or mistake, the written contract does not express the real terms of the agreement. In other states this distinction is repudiated, and the contract will be corrected and enforced, in proper cases, at the instance of either party.

Where such executory contracts, within the statute of frauds, are corrected and enforced, there is a further diversity, — some courts holding that they will only exercise the power where the object is to restrict the subject-matter of the contract, while others hold that the contract will be corrected, although its subject is enlarged. Of this latter opinion is Mr. Pomeroy (2 Pomeroy's Eq. Jur. 367), and other writers of great respectability. Opposed to this view we have the English authorities (*Woollam v. Hearn*, White and Tudor's Leading Cases in Equity), and Bispham's Equity, Wharton's Evidence, sec. 1024, and many decisions in the United States, of which the leading case is *Glass v. Hurlbert*, 102 Mass. 24; 3 Am. Rep. 418. In this case, the court says "that when the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would modify the instrument so as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense: *Jordan v. Lawkins*, 1 Ves. Jr. 402; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Clinan v. Cooke*, 1 Schoales & L. 22. But the fact that the omission or defect in the writing by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. . . . Rectification by making the contract include

obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there was no writing at all."

This decision, in so far as it holds that the subject-matter of the contract may not be enlarged, is supported by abundant authority.

Story's Equity Jurisprudence is often cited to sustain the other view; but the argument there seems to be directed against the distinction between parties seeking and parties resisting specific performance. It refers to the decisions of Chancellor Kent in *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559, and *Keisselbrack v. Livingston*, 4 Johns. Ch. 144. In neither of these cases was the subject-matter enlarged. In *Gillespie's* case (so often cited), the correction made was the striking out of fifty acres from a written agreement which included two hundred and fifty. Bispham's Equity, 445, says "that, in cases which fall within the statute, it is obvious that to carry the rule in *Gillespie's* case to the extent of holding that an agreement (for example) to convey fifty acres may, for the sake of justice and equity, be construed to mean a contract to convey one hundred, would be to repeal the statute of frauds, and to give effect to a simple verbal agreement to sell land. Where, however, the contention of the complainant is, that something which is actually embraced in the writing was not intended to be included therein, to suffer him to show this is not to enforce a parol contract in relation to land; it is simply to prove that a written contract did not embrace all that on its face it appeared to include. Such was the actual state of the case in *Gillespie v. Moon*."

It may be remarked that, in most of the states where such relief is granted, the doctrine of part performance is recognized, and the proof required is but little short of that which is necessary to enforce a contract upon that ground.

In North Carolina, so far from correcting such executory contracts, within the statute, so as to enlarge their terms, the tendency of our decisions is to confine such corrective relief to executed contracts alone. We have been able to find no decision in point, but the words of Hall, J., in *Newsom v. Buf-ferlow*, 1 Dev. Eq. 379, strongly show the disinclination of the court to depart from the statute, except upon the most imperative demands of justice and equity.

The learned judge says: "It is altogether unnecessary to

inquire in this case how far courts of equity have gone in carrying into effect written executory contracts, or varying them by parol evidence. Suffice it to say, that the reason why they have declined giving relief in many such cases is, that the plaintiff had a remedy at law. That reason is not applicable to executed contracts. In those cases the plaintiff has no remedy at law and unless a court of equity will give relief, he can have no redress."

This distinction between executory and executed contracts is thus clearly put by Adams's Equity, 171: "Where land is the subject of the erroneous instrument, the reformation of an executed conveyance is not precluded by the statute of frauds; for otherwise it would be impossible to give relief. But it does not appear that where the defendant has insisted on the benefit of the statute, the court has ever reformed . . . an executory agreement on parol evidence, and specifically enforced it."

Land is regarded as such a high species of property that exceptional safeguards have been devised for the preservation and security of its title, and these should not be departed from, unless such departure is absolutely necessary to subserve the ends of justice. Under the former system, the equitable relief we have mentioned was administered by the trained minds of learned judges sitting as chancellors, who appreciated the grave evils which the statute was designed to prevent, and who gave full effect to the rule which required the clearest and most cogent testimony. Even then the relief in this state was confined, it seems, to executed contracts and surely there is nothing in the new method of trying equitable issues which encourages us to leave the old moorings and venture upon a sea of trouble, confusion, and insecurity.

On the ground of necessity, we correct conveyances by adding clauses of defeasance and words of inheritance. We also restrict or enlarge the subject-matter, but we decline to do this in the case of executory contracts, where there can necessarily be no other object than, as in the case before us, to have it specifically enforced.

It is believed that no great hardship can result from such ruling, as the court will, upon rescission, endeavor to place the parties *in statu quo*, and damages may be given for the fraud and deceit. The court is liberal in the adjustment of equities arising in such cases; but even if occasional instances of hardship occur, it is far better that these should be endured

than that every title in the state should be exposed to the assaults of false and fraudulent oral testimony.

What we have said has no reference to the correction of ordinary executory contracts in aid of actions for damages at law, such as the correction of the terms of a bond, and the like. Equity will always make the correction, and the party can sue upon the corrected contract at law. The two jurisdictions being now blended, such relief will be granted in a single action. It may be that, in cases of personal property, where there is a *pretium affectionis*, the contract may be corrected and specifically enforced; but it is unnecessary to pass upon that question here.

The relief sought in this action is to correct the contract so as to include the Hall tract. It seems, from the complaint, that the alleged fraud consisted in certain false representations as to the number of acres made to the plaintiff when the final agreement was made. False representations are also alleged to have been made to Mr. Griffin, the draughtsman, but these are not specified, and we must assume that they were the same as those made to his principal, Davis. However this may be, we have here a plain case, where it is proposed, upon parol testimony, to correct an executory contract for the sale of land, by making it include a larger quantity than is stated in the writing.

The plaintiff does not wish to rescind, and offers the parol testimony solely for the purpose of reformation.

We think that to admit the testimony in such cases would be, as has been said, virtually repealing the statute of frauds, and opening the door to a flood of evils, the extent of which it would be impossible to estimate.

The plaintiff may enforce the contract in its present form, or he may rescind it, and ask for an adjustment of any equities which may have grown out of the transaction.

We think that the testimony was properly rejected, and that there is no error.

Affirmed.

EXECUTORY CONTRACTS — REFORMATION — PAROL TESTIMONY. — Parol testimony is admissible in equity to vary or reform written contracts and instruments for fraud, accident, or mistake, so as to make them conform to the intention of the parties: *Dunham v. Chatham*, 21 Tex. 231; 73 Am. Dec. 228; *Smith v. Jordan*, 13 Minn. 284; 97 Am. Dec. 232.

KILLEBREW v. HINES.

[104 NORTH CAROLINA, 182.]

VENDOR IN POSSESSION UNDER A CONTRACT OF PURCHASE HAS THE SAME RIGHTS AS MORTGAGOR IN POSSESSION, with respect to crops raised by him upon the land which is the subject of the contract. Mortgagor or vendee in possession is the owner of the crops, and entitled to receive the rents and profits without liability to account. It is only when the mortgagee enters for condition broken that he is entitled to the growing crops, and then only because they are incident to his possession. He must account for them, and equity permits him to retain them only when the land is insufficient to discharge the mortgage debt.

A MORTGAGE IS A MERE SECURITY for a debt. It is only a chattel interest, and the mortgagor continues the real owner of the fee.

THE MORTGAGEE IS NOT ENTITLED TO THE RENTS and profits of the mortgaged premises until he, or some one in his behalf, takes actual possession.

MORTGAGE—MORTGAGEE, WHEN HAS NO RIGHT TO CROPS.—If there be no entry or equitable proceedings by which the crops are sequestered, the mortgagee has no lien upon and cannot recover them, in an action in the nature of replevin therefor against the mortgagor or other persons. Even after entry or sequestration, if the mortgagor has been permitted to remain in possession and cultivate the soil, the mortgagee's interest in the crops is subordinate to the agricultural lien allowed by the statute of North Carolina to persons who have made advances to assist the mortgagor to make the crop.

VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT.—A stipulation in a contract of sale, "this contract to hold everything made on the land, unless otherwise agreed by the vendor," cannot be construed as a reservation of crops not then in existence; and if regarded as a mortgage of crops to be grown, cannot be enforced, except under circumstances in which the enforcement of such a mortgage is possible.

ACTION to recover possession of a crop produced in the year 1882. In aid of the action, the plaintiffs availed themselves of the remedy of claim and delivery, and caused the sheriff to seize thirty-six bales of cotton, of which twenty-four bales were produced on the land hereinafter mentioned. This was the subject of a written contract made in January, 1882, by which plaintiffs agreed to sell to defendants such lands. The contract stipulated that the defendants were to pay plaintiffs fifteen bales of good cotton each year for ten years, after which the plaintiffs were to give a good deed of the lands. If defendants failed to make the full payment for any year, the balance was to stand over for the next year, but if they failed for any two years in succession, the contract was to be void, and the defendants were to pay rent or a forfeiture to the plaintiffs. The contract then further stipulated: "this contract is to hold everything made on the land, unless otherwise agreed by

Killebrew and Bullock." The defendants went into possession under this contract, and cultivated the land embraced therein. One R. S. Wells was allowed to become a party defendant in the action, and to set up an agricultural lien, claimed by him to have resulted from his having furnished supplies to make a crop upon the land. It appeared, at the trial, that two of the fifteen bales of cotton which the defendants contracted to pay plaintiffs had been paid by one Barnes, who occupied a part of the land in the year 1882, and that the plaintiffs had also made a certain advance to defendants to enable them to make a crop on the place, amounting in the aggregate to \$81.30; that the defendants executed an agricultural lien to the defendant Wells on the crops to be raised in the year 1882, said Wells agreeing to furnish supplies to enable defendants to make such crops. Plaintiffs did not authorize Wells to furnish such advances, and he was notified that the plaintiffs would be entitled to thirteen bales of cotton out of the year 1882; that in 1882 the defendants raised on the land seventeen bales of cotton, which were delivered to said Wells.

John L. Bridges, for the plaintiffs.

George V. Strong, for the defendants.

SHEPHERD, J. The controversy in this case is between Wells, whose advances in money and supplies (which are secured by a registered agricultural lien) contributed materially to the making of the crops, and the plaintiffs, whose claim is based upon the legal title to the land upon which the crop was made, as well as upon the particular provisions of the unregistered contract to convey.

It is well settled that, so far as the questions involved in this action are concerned, a vendee let into possession under a contract of purchase stands on the same footing as a mortgagor in possession: *Jones v. Boyd*, 80 N. C. 258.

In discussing, therefore, the interesting question before us, the reasons and authorities applicable to the one will necessarily apply to the other. Without passing upon the contention of Wells, that, by a proper construction of the agreement, the vendees were entitled to the possession for at least two years, and that nothing was due the plaintiffs until the expiration of that time, and adopting the interpretation claimed by the plaintiffs, that upon the failure of the vendees to make the first payment, they were entitled to enter without notice, we will first consider the rights of the plaintiffs by virtue of

the ordinary relation of vendor and vendee, or what is the same as to this case, that of mortgagor and mortgagee.

It was said in *Coor v. Smith*, 101 N. C. 261, and *Brewer v. Chappell*, 101 N. C. 251, that, by reason of the legal title being in the mortgagee, and his right to enter without notice, the products of the land belong to him. It would be more correct to say that the products may, upon certain contingencies, become a security for the debt. While the mortgagor is permitted to remain in possession, he is the owner of the crops, and entitled to receive the rents and profits, without liability to account: *Dunn v. Tillery*, 79 N. C. 497. It is only when the mortgagee enters that he is entitled to the possession of the growing crops, and this is because they are incident to his possession of the soil. He is held to strict account for them, and equity only charges them with the indebtedness when the land is insufficient to discharge it. It is in this sense only that the mortgagee can be considered as having any interest or "property" in the crops. It follows, therefore, that if the crops have been severed before entry, or if, as in this case, there has been no entry at all, the mortgagee, even as against the mortgagor, has no legal right to recover them.

The cases cited in *Brewer v. Chappell*, 101 N. C. 251, did not pass upon this question, but the authority chiefly relied upon is *Jones v. Hill*, 64 N. C. 198, where it is said that "the mortgagee is entitled to the estate, with all the crops growing on it," and "that there is no injustice in this, because the land, including all its products, is a security for the mortgage debt, and to that extent the property of the mortgagee." That case is no authority for the proposition that a mortgagee out of possession may bring an action in the nature of replevin for the recovery of the crops. The plaintiff was the assignee of a mortgage creditor, and purchased the land at a sale under the mortgage. He purchased, says the opinion, "the land, and all the crops growing on it." After his purchase, he demanded the possession of the land of a tenant who was in under the mortgagor. This was refused, and he brought his action for the rent, claiming the sum of fifteen hundred dollars. Having asserted his right to the possession, he alleged that the defendant was insolvent, and was disposing of the crops. The court extended its equitable aid by injunction to prevent their removal. Such relief is often given, either by injunction or by the appointment of a receiver, in actions of

ejectment and suits for foreclosure. In ejectment, where the absolute owner is suing for possession, the relief is given because he is entitled to the present possession of the land, and owing to the insolvency of the defendant, his right to the mesne profits will be defeated. In suits for foreclosure, the relief is only given where, by reason of the insufficiency of the value of the land and the insolvency of the mortgagor, the debt may be partially or wholly lost. In such case, as we will see hereafter, equity charges the growing crops, and applies them to meet the deficiency. It may be that the crops can be thus charged, as between the parties, after severance, but before actual removal, from the land. It is unnecessary, however, to pass upon this point, as no such case is presented here, and the rights of a third party have intervened. One of the reasons for granting equitable relief in the instances mentioned grows out of this very capacity of the occupant to convert the products into personalty, and pass the title to third persons.

When the mortgagee or vendor does not invoke the assistance of a court of equity, but relies solely upon his legal rights, he should not complain of the rigid and technical rules of the common law by which these rights are determined.

While a mortgagee is seised of the legal estate in equity, as we have intimated, the lands mortgaged are considered only as a pledge or security for the debt, and the mortgagee is considered merely a trustee for the mortgagor: 1 Greenleaf's Cruise on Real Property, 577; 2 Story's Eq. Jur., sec. 1013; Adams's Eq. 115.

"The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that, until foreclosure, the mortgagor continues the real owner of the fee": 4 Kent's Com. 159. Accordingly, Lord Mansfield said that, unless possession has been taken of the premises, or a receiver has been appointed, the mortgagor is the "owner as to all the world, and entitled to all the profit made": *Chinery v. Black*, 3 Doug. 390.

"The principle is well settled that a mortgagor is not liable for rents and profits": *Boston Bank v. Reed*, 8 Pick. 462, citing *Fitchburg Cotton Co. v. Melven*, 15 Mass. 268; *Mead v. Lord Orrery*, 3 Atk. 244; *Keech v. Hall*, 1 Doug. 20; *Higgins v. York Buildings Co.*, 2 Atk. 107.

In Lord Orrery's case, Lord Hardwicke remarks: "As to the mortgagor, I do not know of any instance, where he keeps the possession, that he is liable to account for the rents and

profits to the mortgagee; for the mortgagee ought to take legal remedies to get into possession. Nor does the mortgagee derive any profit from the land until actual entry, or other assertion of exclusive ownership, previous to which the mortgagor takes the rents and profits, without liability to account": 1 Greenleaf's Cruise on Real Property, 582, note; 4 Kent's Com. 157.

Chief Justice Smith, in *Oldham v. First Nat. Bank*, 84 N. C. 307, says that a mortgage is an appropriation of real or personal property as a security for the mortgage debt "and while the mortgagor, permitted to remain in possession, may take and use the rents and profits, the mortgagee, at least after default, may enter into or recover possession by action, in order that they may be applied to the reduction of his demand." To the same effect is *Dunn v. Tillery*, 79 N. C. 497, and "The Law in Relation to Crops," by Wade Rogers (Southern Law Review, October and November, 1882). This is also decided in *Freedman's Saving Co. v. Shepherd*, 127 U. S. 502, where it is said that, "even where the income is specially pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is, that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver."

These authorities, and many others which we could cite, abundantly show that, until entry, the mortgagee is not entitled to rents. If he is not entitled to rents, how is it possible that he can, before entry, recover the specific crops, which have been severed, and especially against the lienee, who has, by his advances, materially assisted in their production?

The correct doctrine, we think, is well stated in the learned opinion of Randall, C. J., in *Wooten v. Bellinger*, 17 Fla. 302. The court said: "Equity makes the mortgage, as between mortgagor and mortgagee, a charge upon the rents and profits, whenever the mortgagor is insolvent and the security is inadequate. . . . In this respect, it is said, by some authorities, that 'the land, with all its produce,' is regarded as a security for the mortgage debt, as between the mortgagor and mortgagee; and where the security of the land is hazardous, or clearly insufficient, a receiver may be appointed for the purpose of subjecting the rents and profits of the mortgaged land, thus charging the produce with an equity, though up to the time of

sequestration there was no lien upon it; . . . yet, though the products may be subjected or charged, in equity, with unpaid interest, taxes, etc., they cannot be said to be encumbered so as to give a preference to the mortgagee or vendor claiming a lien upon the land, as against another creditor, who may obtain an express lien upon the crops under the statute, or by chattel mortgage or execution: *Gilman v. Brown*, 1 Mason, 231; 1 Lead. Cas. Eq., 4th Am. from 4th London ed., tit. Vendor's Lien, 496, 502."

We must conclude, therefore, that if there be no entry or equitable proceeding by which the crops are sequestered, the mortgagee has no lien upon and cannot recover them in an action in the nature of replevin, either against the mortgagor or third persons.

Even after entry or sequestration, we hold that, where the mortgagor has been permitted to remain in possession and cultivate the soil, the lien for advances must prevail. We put this on the ground that this implied agreement to remain in possession must be presumed to have been made with reference to the general laws, and these provide that the agricultural lien shall be superior to all others, except that of the landlord.

Another reason is, that equity will not charge the crops so as to defeat the superior equity of the lienee, who has borne the expense of their cultivation and production. To hold that, under such circumstances, the mortgagee may enter and appropriate to his exclusive use the entire crop would be dealing a fatal blow to a numerous class of agriculturists in this state, many of whom are so unfortunate as to have their lands encumbered by mortgages. If the mortgagee could enter at any time, and apply the entire crop to his indebtedness, no one could be found to make advances to the mortgagor, and the result would be, that a great part of the mortgaged land would remain uncultivated, while the mortgagor would be deprived of earning the means with which to redeem his property.

Such, we apprehend, was never the doctrine of North Carolina; and the act of 1889, chapter 476, protecting the holder of the agricultural lien against the mortgagee in such cases was but declaratory of a correct exposition of existing laws.

The case of *Brewer v. Chappell*, 101 N. C. 251, and of *Coor v. Smith*, 101 N. C. 261, in so far as they are inconsistent with the principle declared in this opinion, are overruled.

Thus far, as proposed, we have considered this case as governed by the law applicable to the ordinary relation of vendor and vendee, or mortgagor and mortgagee, and our conclusion is, that the action cannot, in such case, be sustained.

We will now proceed to inquire into the effect of the following clause of the agreement: "This contract to hold everything made on the land, unless otherwise agreed by Killebrew and Bullock," the vendors. As no crops were in existence, this cannot be considered as a reservation of them so as to confer a lien; and the most favorable view to the plaintiffs is, that the words amount to a mortgage upon crops to be made. This is binding, without registration, as between the parties, on the crops planted the year next after the execution of the mortgage: *Wooten v. Hill*, 98 N. C. 49; but it cannot affect the rights of subsequent mortgagees, although they were fixed with actual notice: *Todd v. Outlaw*, 79 N. C. 235. Even if registered, it must, as we have seen, be subordinated to the superior lien conferred upon the defendant Wells by section 1799 of the code.

We can see no injustice in this application of the statute. It was made in aid of agriculture, and its provisions extend not only to crops made on the land of the lienor, but to those made on any land which he may cultivate. It must be presumed, we repeat, that all contracts by which persons are permitted to enter upon and cultivate land are made with reference to the general law upon the subject.

The position that the plaintiffs are entitled to priority as landlords is without merit; for the agreement expressly negatives such a relation until the expiration of two years.

It follows, therefore, that Wells must be first satisfied to the amount of his advances. If there be any balance, the plaintiffs are entitled to the same, to be applied as a part payment on the land. Judgment must be given accordingly, and the plaintiffs must be taxed with the costs of both appeals.

MERRIMON, J. (concurring). It seems to be suggested, by implication, in the opinion of the court in this case, that something not specified was decided in *Brewer v. Chappell*, 101 N. C. 251, and *Coor v. Smith*, 101 N. C. 261, inconsistent with what is decided in this case, and to that extent they are overruled. In my judgment, such suggestion is unfounded. Those cases were well considered by the court, and, I think, correctly decided. The application of the law in them is sus-

tained by reason and the authorities cited, and many others that might have been cited; and they are not inconsistent with, certainly, the substance of what is decided in this case.

In *Brewer v. Chappell*, 101 N. C. 251, it is held that a mortgagor in possession of the land after the condition of the mortgage is broken had no right to give an "agricultural lien" upon a prospective crop to be made on the land, as against the mortgagee, in the absence of a contract allowing him to do so, upon the ground that at law the mortgagee is the owner of the land, and the mortgagor remaining in possession after condition broken, in the absence of agreement to the contrary, is not in possession as of right, but by permission of the mortgagee; his possession is that of the mortgagee, and the latter might turn him out of possession at his will and pleasure, without notice. *Coor v. Smith*, 101 N. C. 261, rests upon the same principle. The equitable rights of the mortgagor were not adverted to in these cases, because it was not necessary to do so, and because such rights of the mortgagor are subject to the rights of the mortgagee, until the mortgage debt shall be discharged. Such is certainly the settled law of this state.

In *Williams v. Bennett*, 4 Ired. 122, Chief Justice Ruffin said that "the mortgagor was concluded by his deed; and after its execution his possession is by consent of the mortgagee, and is in law his possession." In *Jones v. Hill*, 64 N. C. 198, Justice Rodman said: "If a mortgagor remains in possession after the forfeiture of the property, he remains only by permission of the mortgagee. In such case, the mortgagor has been sometimes called a tenant at will or sufferance, and sometimes a trespasser, but he is properly neither; his position cannot be more correctly defined than by calling him a mortgagor in possession, but he may be ejected at any time by the mortgagee, without notice. The mortgagee is entitled to the estate, with all the crops growing on it. There is no injustice in this, because the land, including all the products, is a security for the mortgage debt, and to that extent the property of the mortgagee. The mortgagor has no right to make a lease to the prejudice of the mortgagee; the lease is void if the mortgagee elects to hold it so. If the mortgagor could lease, he might altogether defeat the claim of the mortgagee." He cites many authorities in support of what he thus said. *Fuller v. Wadsworth*, 2 Ired. 263, 38 Am. Dec. 692, *Whitehurst v. Gaskill*, 69 N. C. 449, 12 Am. Rep. 655, *Hill v.*

Nicholson, 92 N. C. 24, *Johnson v. Prairie*, 94 N. C. 773, *Dail v. Freeman*, 92 N. C. 351, recognize the same principle.

The same principle applies in the case of vendor and vendee; the latter in possession being, in most important respects, on the same footing as the mortgagor in possession: *Allen v. Taylor*, 96 N. C. 37, and the cases there cited.

The decision in this case, as I understand it, does not contravene the rule of law as thus settled in this state. It plainly recognizes the right of the vendor, in the absence of any contract express or implied to the contrary, to take possession of the growing — the unsevered — crop made by the vendee, and the equitable right of the latter to have the same devoted to the payment of the debt of the former, so far as it may be adequate. It further decides that when the vendor allows the vendee to remain in possession of the land, and make a crop, and sever the same, the former cannot recover the severed crop from the latter or third persons; and this rests upon the ground of the presumed assent of the vendor to allow the vendee to make and take the crop. The like rule applies to mortgagee and mortgagor. To allow the vendee or the mortgagor to encumber the crops at their will and pleasure, to the prejudice of the vendor or mortgagee, they might, as was said in *Jones v. Hill*, 64 N. C. 198, "altogether defeat the claim of the mortgagee."

The statute (Acts 1889, c. 476) changes the law so as to allow vendees and mortgagors in possession of the land to give "agricultural liens" as against vendors and mortgagees. It does not give them the right to so mortgage their crops for other purposes.

Error.

VENDOR AND VENDEE — GROWING CROPS. — As between vendor and vendee growing crops are part of the realty, and pass to the vendee: *Smith v. Leighton*, 38 Kan. 544; 5 Am. St. Rep. 778, and note.

MORTGAGE — GROWING CROPS. — As to whether a mortgage is valid or not upon crops to be planted or to be grown, see *Luce v. Moorehead*, 73 Iowa, 498; 5 Am. St. Rep. 695, and note; note to *Moody v. Wright*, 46 Am. Dec. 713, 714.

MOOSE v. CARSON.

[104 NORTH CAROLINA, 431.]

STREETS. — If a conveyance is made of a town or city lot as bounded by streets or alleys marked on a map or plat, and the grantee enters into possession, and expends money in improving the property, he is entitled to a right of way over such streets or alleys as appurtenant to the land, and any subsequent conveyance by his grantor, or those claiming under him, of a portion of such streets or alleys by which the land is bounded, will be held void.

DEDICATION OF STREETS TO PUBLIC USE IS IRREVOCABLY MADE when the owner of land including such streets lays out the land into lots and streets, and induces persons to buy and build upon lots adjacent to such streets, though they may not have been accepted by the authorities of the town or city in which they lie.

STREETS AND PUBLIC SQUARES. — **ADVERSE OCCUPANCY** of a street or public square which has been dedicated to public use will not confer any right as against the public.

STREETS, SALE OF, BY TOWN OR CITY. — **OWNERS OF LANDS FRONTING UPON A PUBLIC STREET** in which they have an easement, arising from their having purchased all such lands from the former owner thereof, and of such streets, and procured a conveyance thereof in which their lots are designated as bounded by such streets, cannot be deprived of their rights by a sale for the benefit of the town, which was, in effect, though not in name, one of the grantors through whom they claim title.

STREETS, VESTED INTEREST OF LOT-OWNERS THEREIN. — **THE LEGISLATURE CANNOT DEPRIVE A LOT-OWNER** of his right in a public street, acquired by his having bought, occupied, and improved the land adjacent thereto after such land had been laid out in lots and streets, and when his conveyance describes his lot as being bounded by such streets. The lot-owner's interest in the street is just as indefeasible and secure from legislative impairment as is his title to his lot.

ACTION to recover possession of lands in the town of Taylorsville. The town site of that town was originally vested in James Thompson, chairman of the court of common pleas and quarter session, and his successors in office, and was laid out in lots and blocks bounded by streets and alleys. While so laid out, the defendants, or their grantors, bought the lots fronting on East Back Street as early as the year 1848, and entered into their occupancy in the year 1853. The land in controversy in this action was a part of that street, and the title of the plaintiffs was based on a sale and conveyance made in 1888 by the authorities of the town, claiming the right to make such sale under an act of the legislature of the state. The trial court directed judgment to be entered for the defendants, and thereupon the plaintiffs appealed.

E. C. Smith, for the plaintiffs.

R. Z. Linney, for the defendants.

AVERY, J. It is a well-settled principle that where a corporation, acting through its properly constituted authorities, or an individual, sells or conveys a town or city lot bounded by streets or alleys marked out on a plat, and the grantee enters upon it, and expends money in improving it, he is entitled to a right of way over such street or alley as appurtenant to the land, and any subsequent conveyance by his grantor, or those claiming under him, of the portions of such streets or alleys by which the grantee's lot is bounded, will be held void: *Pratt v. Law*, 4 Myer's Fed. Dig., tit. Contracts, 1046; *Chapin v. Brown*, 15 R. L. 579; *Sarpy v. Municipality*, 9 La. Ann. 597; 61 Am. Dec. 221; *Port Huron v. Chadwick*, 52 Mich. 320; *Harrison v. Augusta Factory*, 73 Ga. 447.

The grantor thus dedicates the land covered by a street to the use of the public, and will be precluded, by such appropriation, from reasserting any right to the actual possession of the land, at least so long as it remains in the public use: *Kennedy v. Jones*, 11 Ala. 63; *Proctor v. Lewiston*, 25 Ill. 153; *Adams v. Saratoga*, 11 Barb. 414; *Penny Pot Landing v. Philadelphia*, 16 Pa. St. 79; *In re Pearl Street*, 111 Pa. St. 565.

When, by laying off streets, third parties have been induced to buy lots adjacent to them, and build on the lots, by an individual grantor, the dedication to the public use has been held irrevocable, although the streets may not have been formally accepted by the authorities of a town in which they lie: *Grogan v. Town of Hayward*, 4 Fed. Rep. 161.

No one can acquire, as a general rule, by adverse occupation, as against the public, the right to a street or square dedicated to the public use: *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437.

We may deduce, from the rules of law already stated, the further principle, that the owners of a lot having a property or easement appurtenant in the adjacent streets, with reference to the advantages of which they expended their money for the land and the improvements put upon it, cannot be deprived of their rights by a sale for the benefit of the town that was, in effect, though not nominally, one of the grantors through whom they claim title; nor has the legislature the power to deprive them of such appurtenant rights by authorizing such grantor, whether a person or a corporation, to again enter upon and sell such streets to others. The general assembly cannot, without a violation of the constitution, divest, or provide for divesting, by law, the right of a person to his property, for

the purpose of vesting such right in another person or corporation, merely for private use, at all, and it has no power, under the organic law, to provide for taking private property for public purposes without just compensation, to be ascertained in a mode pointed out by the law.

The appurtenant right of the owner of a lot in the street that formed its boundaries at the time when he, or those under whom he claims, bought it originally, with reference to such outlets, is protected against the reassertion of the grantor's claim to it just as fully as is his title to the lot conveyed, even though the state may undertake by law to sanction the re-entry on the streets by one claiming under his title. Neither the mayor of the town of Taylorsville, nor the county commissioners of Alexander County, by virtue of the authority derived from section 1, chapter 86, Private Laws of 1887, to hold lands conveyed to the town, nor under the more explicit power to sell streets that, in terms, is given by chapter 8, Private Laws of 1889, are empowered to make a valid conveyance to any part of a street, with reference to which, as a boundary, the defendants, or those under whom they claim, bought lots in the year 1848 and improved them in 1853: *Pratt v. Law*, 4 Myer's Fed. Dig., tit. Contracts, 1046; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; *Brooks v. Riding*, 46 Ind. 15.

The said mayor or commissioners cannot diminish the width of such streets from sixty-six feet, as laid off when the lots were originally sold, to sixteen, by conveying fifty feet of East Back Street, extending from North Main to North Back Street, and leaving an alley of only sixteen feet as a pass-way for the defendants along their front. Their ancestor took with his title all the appurtenant advantages of a street sixty-six feet wide, and the tendency of converting it into an alley would or might be to impair the value of their property for the benefit of the town, and without compensation to them: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; 2 Dillon on Contracts, sec. 675, p. 674, note 1.

The defendants do not own the fee in the street on their front, but hold only an appurtenant easement therein; and the municipal corporation that sold the lots occupies the same relation to them as would an individual grantor who had originally sold to them, or to those under whom they claim, and he could neither with nor without authority purporting to be derived from the legislature have reasserted his right to

the streets laid out by him before selling: *New Orleans v. United States*, 10 Pet. 717; *Grogan v. Town of Hayward*, 4 Fed. Rep. 161.

The plaintiffs have shown no such title as would warrant the court in granting a writ of possession. If the fee were vested in the town, which is not conceded, there would still be wanting in the plaintiffs, its grantees, the right to prevent possession and occupancy of a street dedicated to the public: *City of Cincinnati v. Lessee of White*, 6 Pet. 431.

It is not necessary to decide whether the mayor of the town of Taylorsville, by joining the chairman of the board of county commissioners, could, by virtue of a private sale, make a valid conveyance of any land belonging to the town, when the statute (Code, sec. 3824) gave the power to the "mayor and commissioners of any incorporated town to sell at public outcry, after thirty days' notice." If the original conveyance did not operate to pass the title to the street when executed, the legislature could not, pending this suit, impart to it such vitality as to relate back to the commencement of the action, and establish plaintiff's right to recover. The municipality derives its powers from the express grant of the legislature, and exercises and enjoys them subject to the legislative right of revocation; but in controlling the property of the corporation the general assembly is restricted by the fundamental principle that private property cannot be taken for public use without just compensation, nor can a town be invested with authority to violate its implied contract (either directly or through its grantee, who is in privity with it) to provide a street sixty-six feet wide for the advantage of a lot conveyed by one who held in trust for the benefit of the town.

Affirmed.

STREETS — DEDICATION. — As to what is essential to and what constitutes a valid dedication to the public, see *Board of Supervisors v. Seal*, 66 Miss. 129; 14 Am. St. Rep. 545, and note 549, 550; *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22, and note.

STREETS — ABUTTING LOT-OWNERS — EASEMENTS. — As to the rights of abutting lot-owners in the streets of a city, see *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644, and note 653, 654.

STREETS — ADVERSE POSSESSION. — No title can be acquired in public streets by adverse possession; *Yates v. Town of Warrenton*, 84 Wis. 337; 10 Am. St. Rep. 860, and note.

EVERETT v. RABY.

[104 NORTH CAROLINA, 479.]

EXECUTION, WHAT EQUITIES NOT SUBJECT TO. — If lands are purchased and paid for by a debtor, who, for the purpose of defrauding his creditors, takes the title in the name of another, the debtor has no interest in such land subject to execution sale. The remedy of his creditors is by an action in the nature of a bill in equity to subject such lands to the payment of their debts.

A. M. Fry, for the plaintiff.

F. C. Fisher, for the defendant.

SHEPHERD, J. The complaint alleges that J. B. Raby purchased and paid for the land described in the complaint, but, for the purpose of defrauding his creditors, procured the title to be made to his father, the defendant. Judgments were obtained against the said J. B. Raby, and, under them, executions issued, and were levied upon the lands. The plaintiff purchased at a sale under these executions, and brings this action for the possession, and also to have the defendant declared a trustee for his benefit. No answer was filed, and judgment was rendered in accordance with the prayer of the complaint, from which the defendant appealed.

It is hardly necessary to cite authorities to show that the interest of J. B. Raby could not be sold under execution. The distinction between an estate in equity and a mere right in equity, in this respect, is well stated in *Hinsdale v. Thornton*, 75 N. C. 382. In this case, Pearson, C. J., says: "When one has an estate in equity, viz., a trust estate, which enables him to call for the legal estate without further condition save the proof of the facts which establish his estate, this trust estate is made the subject of sale under *feri facias*. But where one has only a right in equity to convert the holder of the legal estate into a trustee and call for a conveyance, the idea that this is a trust estate, subject to sale under *feri facias*, is new to us."

In the present case, the judgment debtor did not have even a right in equity, as it is alleged that the trust was infected with fraud; in which case the court would not act at the instance of either party: *Page v. Goodman*, 8 Ired. Eq. 16.

There can be no question as to the sale being void, and that the remedy of the creditors is an action in the nature of a bill in equity to subject the land to the payment of their debts: *Jimmerson v. Druncan*, 3 Jones, 538; *Gowing v. Rich*, 1 Ired. 553;

Gentry v. Harper, 2 Jones Eq. 177; *Morris v. Rippy*, 4 Jones, 533; *Love v. Smathers*, 82 N. C. 369.

It is but just to say that this point was not made before his honor, but as it is our duty to inspect the whole record (*Norris v. McLam*, 104 N. C. 159), and as the defect is inherent, we think it better to put our decision upon this ground, without noticing the questions of practice raised in the court below.

The judgment should be set aside, as unwarranted by the allegations of the complaint.

Error.

CREDITORS MAY REACH BY A BILL IN EQUITY a fund arising out of a mixed trust in which their debtor has an interest, though they may not be able to levy upon it at law: Note to *McLeane v. Smith*, 97 Am. Dec. 314.

JUDGMENT LIENS ATTACH TO LANDS BOUGHT WITH THE JUDGMENT DEBTOR'S MONEY, but the title to which was taken in the name of another, in order to defraud creditors: *Slattery v. Jones*, 96 Mo. 216; 9 Am. St. Rep. 344. Compare *Eneberg v. Carter*, 98 Mo. 647; 14 Am. St. Rep. 664, and note.

ODOM v. RIDDICK.

[104 NORTH CAROLINA, 515.]

INSANE PERSONS, SALES AND CONVEYANCES BY. — A purchaser for value, of real property, in the absence of notice to the contrary, may act on the presumption that all the grantors of the property whose deeds appear of record in due form were of sound mind when such deeds were executed, and none of such grantors can afterwards defeat such deeds by proving their mental incompetency at the time they were executed.

DEED OF A LUNATIC NOT UNDER GUARDIANSHIP is not void, and cannot be avoided as against an innocent purchaser for value in good faith, and without any knowledge of the incapacity of the grantor.

DEED OF A LUNATIC WILL NOT BE SET ASIDE, EVEN THOUGH THE GRANTEE THEREIN KNEW OF THE GRANTOR'S MENTAL INCAPACITY, if no fraud was practiced on the latter, nor undue influence exercised over him, and the deed was made under the advice of his counsel, for a full and fair consideration, and the transaction was for the advantage of the grantor and his family.

ACTION for the possession of a tract of land conveyed, in 1866, by Oliver Odom to his brother Richard Odom, under whom the defendants deraign title. The plaintiffs were the heirs at law of Oliver Odom, and they sought to avoid his conveyance by proof that at and a long time before it was made he was totally insane. The insanity of Oliver was established at the trial; but it was also proved that no fraud was practiced on him, nor undue influence exercised over him; that he acted

under the advice of his attorney; that the price paid was a full and fair consideration for the land; that the grantee knew of the grantor's insanity at the time; that the grantor and his family were benefited by the sale and deed, and thereby received their support for a number of years; and that the grantees of Richard Odom, when they purchased the property, did not know of the mental unsoundness of Oliver Odom at the time he executed the deed in question. The trial court adjudged the deed made by Oliver Odom to be voidable, on the payment, by the plaintiffs to the defendants, of the purchase-money, and the enhanced value of the land caused by their improvements. Both parties appealed.

L. L. Smith, for the plaintiffs.

R. H. Battle, for the defendants.

CLARK, J. The reference was by consent. By its terms the referee was vested "with power, sitting as a chancellor, to decide upon the facts, and all matters of law and equity arising upon the pleadings and testimony, with liberty to either party to except as to the referee's rulings on such matters of law and equity, and to appeal therefrom." The parties reserved the right to except only to the referee's rulings as to the law. By any reasonable construction, his findings of fact were to be conclusive. He found, as a fact, that the defendants purchased the land for value, and without notice of any mental incapacity on the part of Oliver Odom. Had the defendants purchased directly from Oliver Odom, for value, and without notice of his mental incapacity to make a deed, a court of equity would not, ordinarily, set aside the deed: *Riggan v. Green*, 80 N. C. 236; 30 Am. Rep. 77.

We do not see that the condition of the defendants is any worse because they bought mediately, and not immediately. The presumption of law is in favor of sanity, and this presumption is so strong that, when a want of it is claimed, even in a capital case, the burden is on the defendant to prove it, the presumption of sanity being stronger than the presumption of innocence. When, therefore, a purchaser sees a regular chain of title, formal in all particulars, upon the registration-books, executed by grantors of full age, and not *feme covert*s, he has a right to rely upon the presumption of sanity; and if, without any notice or matter to put him upon inquiry, and for fair value, he takes a deed, he should be pro-

tected. Any other doctrine would place all titles upon the hazard.

If the title of an innocent purchaser for value without notice can be upset for the alleged mental incapacity of one grantor, it can be done though the grantor may have been a very remote one. The evidence must necessarily be sought among those friendly to the heirs of such grantor,—the neighbors and acquaintances of the party of alleged incapacity,—and it would be difficult for the grantee in possession to furnish proof of the sanity of every grantor through whom he claims. Every man who shows the abnormal condition of mind which incapacitates him to make a conveyance of his property is sure to attract the attention of those around him, who have the power, and sometimes exercise it, to conceal the fact. It is a safer rule to require his heirs, or those acting for them, to take prompt steps to have the deed set aside, and parties placed *in statu quo*, before the property is conveyed to other parties, and while the facts are capable of full investigation, than to subject a remote grantee to maintain the integrity of his title by rebutting allegations of incapacity in any one of a long line of grantors.

A purchaser for value from one whose deed is declared by the jury to be fraudulent and void gets a good title, if he has no notice of the fraud in his vendor's deed: *Young v. Lathrop*, 67 N. C. 63; 12 Am. Rep. 603; *Wade v. Saunders*, 70 N. C. 270; *Davis v. Council*, 92 N. C. 725; *Perry v. Jackson*, 88 N. C. 103.

The fact that it is found here that the defendants' grantor obtained the deed without fraud or undue influence, for a full and fair price, and acting under advice of Oliver Odom's counsel, who had been his attorney for years, surely cannot be allowed to put the defendants in a worse plight than they would have been placed if their grantor had procured the conveyance by fraud and undue influence.

The great teachers of English law say that persons of non-sane memory, etc., "are not totally disabled to convey or purchase, but only *sub modo*. Their conveyances are voidable, but not void": 2 Bla. Com. 291, and 2 Kent's Com. 451. The deed of a person of unsound mind, not under guardianship, conveys the seisin: *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391; *Crouse v. Holman*, 9 Ired. 30, and cases cited. Story's Eq. Jur., sec. 227, says: "The ground upon which courts of equity now interfere to set aside the contracts and

other acts, however solemn, of persons who are idiots, lunatics, and otherwise *non compos mentis*, is fraud. Such persons being incapable in point of capacity to enter into any valid contract, or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights." To same purport, Adams's Eq. 183, and cases cited. This places the doctrine upon an intelligible basis, and delivers the courts from the evident injustice and insurmountable inconvenience of declaring that all contracts made with one apparently sane, but who proves to have been insane, void *ab initio* for want of a consenting mind. This doctrine would give a lunatic or his heirs restoration of property sold by him without return of the money received for it, as was actually held in *Gibson v. Soper*, 6 Gray, 279; 66 Am. Dec. 414; and *Rogers v. Walker*, 6 Pa. St. 371; 47 Am. Dec. 470. The correct rule is stated by Mr. Story, in section 228: "If a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will be done to the other side, and the parties cannot be placed *in statu quo*." Buswell on Insanity, section 413, says: "A completed contract for the sale of land, made by an insane vendor, without fraud, or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or in equity, in favor of the vendor or his representatives, except the purchase-money be restored, and the parties fully reinstated in the condition in which they were prior to the purchase. This rule appears to be unquestioned in the English courts."

To the same effect is the able opinion of Horton, C. J., in *Gibbon v. Maxwell*, 34 Kan. 8, decided in 1885, in which numerous authorities are reviewed and commented upon, and also *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428, in which the opinion is delivered by a very eminent judge (Dillon), and *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Allen v. Berryhill*, 27 Iowa, 534; 1 Am. Rep. 309; 2 Pomeroy's Eq. Jur., sec. 946. See also *Scanlan v. Cobb*, 85 Ill. 296; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; 2 Am. Rep. 202; *Eaton v. Eaton*, 37 N. J. L. 108; 18 Am. Rep. 716; *Freed v. Brown*, 55 Ind. 310; *Carr v. Halliday*, 5 Ired. Eq. 167. In *Lancaster etc. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24, a lunatic was held liable upon a note discounted him by the bank, and Paxton, J., says: "It would be an unreasonable and unjust

rule that such persons should be allowed to obtain the property of innocent parties, and retain both the property and the price. Here the bank in good faith loaned the defendant money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the *corpus* of his estate." To same purport is *Person v. Warren*, 14 Barb. 488; *Allis v. Billings*, 6 Met. 415; 39 Am. Dec. 744. The courts have gone further, and held that when the contract is fair and *bona fide*, executed and completed, and the parties cannot be again put *in statu quo*, and there was no notice of mental incapacity, the court will not set aside the contract at all: *Molton v. Camroux*, 2 Ex. 487, affirmed on appeal, 4 Ex. 17; *Yauger v. Skinner*, 14 N. J. Eq. 389; *Neil v. Morley*, 9 Ves. 478; also, Lord Chancellor Truro in *Price v. Berrington*, 3 Man. & G. 498, and Lord Cranworth in *Elliott v. Ince*, 7 De Gex, M. & G. 474.

It is clear, from these authorities, that the conveyances of an insane person not previously declared insane are voidable merely, and not void; that the right to set them aside is based upon the ground of fraud, and that the court will not usually interfere unless there has been fraud, or a knowledge of the insanity by the other party, and will then place the parties *in statu quo*. When, therefore, as in this case, the grantee knew of the mental incapacity of the grantor, but it is found, as a fact, "that no fraud was practiced upon Oliver Odom, or undue influence exercised to induce him to make the deed; that he acted under the advice of his lawyer, who had been his counsel for years; that the price paid was a full and fair consideration for the land; and that the grantor was benefited by the making of the deed, as he and his family thereby received a home and support,"—it would seem that a court of equity would not set aside such conveyances, even as between the parties thereto, and certainly not without restoring the *status quo ante*: *Selby v. Jackson*, 6 Beav. 192.

"Courts of equity ever watch with a jealous care every contract made with persons *non compos mentis*, and always interfere to set aside their contracts, however solemn, in all cases of fraud, or when the contract or act is not seen to be just in itself, or for the benefit of such persons": *Riggan v. Green*, 80 N. C. 239; 30 Am. Rep. 77.

The deed to Richard Odom passed the legal title, and was voidable by Oliver Odom, or his heirs, only upon the ground

of fraud in taking title from one whom the grantee knew to be mentally incapacitated. The property has been conveyed for a fair value to innocent parties who took without notice. It has been held in the leading English case of *Greenslade v. Dare*, 20 Beav. 234, by the master of the rolls (since Lord Romilly), that if a conveyance is made by an alleged lunatic under undue influence, and for an inadequate consideration, a purchaser from such grantee for a valuable consideration, and without notice, would be protected, as any other purchaser for value, and without notice, from a fraudulent alienee. The court instances the insecurity of purchasers if any other doctrine should be laid down. The case of *Ashcraft v. De Armond*, 44 Iowa, 229, is not exactly in point, but illustrates the proposition that deeds from an undeclared lunatic are voidable on the doctrine of fraud. It holds that where the grantee of a lunatic took for value, and without notice, a subsequent purchaser from such innocent grantee for value, though with notice of the original grantor's incapacity, would not be affected, and cites the well-established doctrine laid down in *Kerr on Fraud and Mistake*, 316, and cases there quoted. Indeed, the facts in *Riggan v. Green*, 80 N. C. 239, 30 Am. Rep. 77, are almost identical with those in this case in every particular, and that case should be conclusive of this.

As to exception 6 of the plaintiff, it is sufficient to say: 1. Roxana B. Odom is not a party to this action; her rights, if any, are not set up in the complaint, and the plaintiffs claim under their father, and not under her. 2. The deed from Oliver to Richard Odom was executed February 21, 1866, two years and a half before the married women's rights were enlarged by the constitution of 1868, and more than a year before the act was passed restoring to married women the common-law right of dower, March 2, 1867. There was no necessity, then, for a wife to join her husband to convey his land: *Sutton v. Askeu*, 66 N. C. 187; 8 Am. Rep. 500; see also the code, sec. 2115.

Our conclusion, therefore, is, that, upon the facts found, judgment should have been entered for the defendants. This disposes of both appeals.

In the plaintiff's appeal, no error. In the defendants' appeal, error.

DEEDS — INSANE PERSONS. — Deeds by insane grantors are not void: *Pearson v. Ooa*, 71 Tex. 246; 10 Am. St. Rep. 740, and note. Compare *Rollet v. Heiman*, 120 Ind. 511; 16 Am. St. Rep. 340.

LEA v. LEA.

[104 NORTH CAROLINA, 608.]

DIVORCE. — ALIMONY MAY BE ALLOWED IN AN ACTION TO HAVE A MARRIAGE DECLARED VOID because the defendant at the time of such marriage was the husband of another woman who is still living.

DIVORCE, SUIT FOR, WHAT IS. — A SUIT TO HAVE A MARRIAGE DECLARED VOID because one of the parties was incompetent to enter into it is properly styled a suit for a divorce, and the woman who is plaintiff in such suit may be awarded alimony *pendente lite*.

ACTION by plaintiff to annul a marriage contract between her and the defendant, upon the ground that at the time it was contracted the defendant was already a married man, and that his wife is still living. During the pendency of the action, a motion for alimony was made, and was resisted, chiefly upon the ground that the action was not one for divorce, and that alimony could not be granted to the plaintiff, because it appeared, by her pleading, that she was not the wife of the defendant, and that the defendant was incompetent to make her his wife, because of a preceding marriage, which had not been dissolved by death or otherwise. The trial court, however, granted the motion for alimony, and the defendant appealed.

L. M. Scott, for the defendant.

No counsel for the plaintiff.

SHEPHERD, J. The defendant denies his liability for alimony *pendente lite*, for the reason that this is not, technically, an action for divorce from the bonds of matrimony, but an action to declare a marriage void, because of a prior existing marriage on the part of the defendant.

At common law, suits for nullity were freely entertained in the ecclesiastical courts, and while they were unnecessary in cases like the present, so far as they affected the actual legal relations of the parties, it was deemed "expedient to procure a sentence, to prevent the consequences which might, in future, take place from the death of witnesses, or other occurrences, rendering proof of the invalidity of the marriage difficult or impossible. . . . It is a matter of duty which the courts owe to the public to declare the situation of the parties. . . . It may be necessary, for the convenience and happiness of families, and of the public likewise, that the real character of these domestic connections should be ascertained and made known": Shelford on Marriage and Divorce, 332. Appreciating these

reasons, our legislature has provided (code, sec. 1283) "that the superior court, in term-time, on application made, as by law provided, by either party to a marriage contracted contrary to the prohibition contained in chapter 42 [code], or declared void by said chapter, may declare such marriage void from the beginning."

Chapter 42, section 1810, of the code provides that all marriages "between persons, either of whom has a husband or wife living at the time of such marriage, . . . shall be void."

It was decided in *Taylor v. Taylor*, 1 Jones, 528, that the courts of this state had no power to allow alimony *pendente lite*, but this relief was subsequently given by the legislature, in 1852, and the existing law upon the subject is to be found in the code, sections 1291 et seq., which provides that such alimony may be given where any married woman shall apply to a court for a divorce from "the bonds of matrimony, or from bed and board."

It is insisted by the defendant that, as the marriage was void, there were no "bonds of matrimony" to dissolve, and therefore the plaintiff's case is not within the statute. We cannot accept this restricted interpretation. The words "from the bonds of matrimony," *a vinculo matrimonii*, have a well-known significance at common law, and it must be presumed that it was in this sense that they were used by the legislature.

At common law, no divorce *a vinculo* could be granted, except for causes existing previous to the marriage, and which "rendered the marriage unlawful *ab initio*." "In such cases," says Blackstone, "the law looks upon the marriage to have been always null and void, . . . and decrees not only a separation from bed and board, but *a vinculo matrimonii* itself": 2 Bla. Com. 94. In view of this high authority, the argument of the defendant, founded upon the strict and literal meaning of the words of the statute, must fall to the ground. Pre-contract of marriage is, in common legal parlance, considered as a cause for divorce. For example, we have the able and discriminating Mr. Irving Browne, in his work on domestic relations, page 61, using the following language: "The law recognizes three kinds of divorces: 1. Divorces on the ground of the nullity of the marriage contract. . . . For this divorce there are, generally, five causes, — lack of legal age, former marriage," etc.

We could, if necessary, add a great number of authorities

in which the word "divorce" is used in this comprehensive sense, but it is unnecessary to do so, as we have a decision in our own reports which we think fully settles the question. It is the case of *Johnson v. Kincade*, 2 Ired. Eq. 470. There the marriage was declared a nullity because of the mental incapacity of the plaintiff. There was no statute conferring jurisdiction upon the courts in cases of judicial separation, except chapter 39, Revised Statutes. This provided that the superior courts of law and equity should have sole and original jurisdiction "in all cases of application for divorce and alimony." The causes specified were, impotency at the time of the contract, adultery, and "any other just ground of divorce."

It is clear, from the above language, that unless the case could be brought within the meaning of the word "divorce," the court had no jurisdiction. Chief Justice Ruffin, after discussing other parts of the chapter, says: "It is plain, therefore, that the act covers the case in which the parties contracted by show of marriage, but were never in law and truth married, for want of capacity, for which reason the sentence pronounces the marriage null and void; but because there is a marriage *de facto*, the sentence proceeds to dissolve that." The court therefore pronounces that the marriage in fact solemnized between Reese Johnson and Anna Kincade is "in law null and void, for the want, at the time of solemnizing the same, of mental capacity, on the part of the said Reese, sufficient to understand the nature of and assent to such a contract, and that the said Reese ought to be, and is, set free and divorced from the said Anna." Here we have the court granting a divorce on the ground that the contract was null and void. We think that these authorities sustain us in holding that the words of the statute embrace all cases where there has been a *de facto* marriage.

The defendant further contends that inasmuch as the plaintiff alleges that the marriage is void, she is estopped. This is but another form of the foregoing objection, and is therefore untenable. If, as we have seen, her case is within the statute allowing alimony, it would be strange indeed if she is to be deprived of it by alleging the very fact upon which her cause of action depends. All that the law requires is the proof or admission of a *de facto* marriage. This suggestion of estoppel comes with little grace from one who has beguiled the plaintiff into a false marriage, and who, when she is compelled to leave him by reason of his cruel treatment, as well

as the discovery of her forlorn legal *status*, detains from her what little property she owns.

Such are the facts found by his honor for the purpose of this motion. They should not, of course, work prejudice to the defendant, upon the trial of his case before the jury.

In further support of the view we have adopted, we add the authority of Shelford on Marriage and Divorce, 587, which says that, "after proof of a marriage in fact, alimony pending the suit will be allotted, whether commenced by or against the husband, not only in cases of impotency, but in all cases of nullity of marriage." To the same effect is 2 Bishop on Marriage and Divorce, 402, where the learned author fully sustains us, and successfully refutes the opposing view. This author says that the right to alimony *pendente lite* grows out of the changed pecuniary relations of the parties, by which the property of the wife is practically placed under the control of the husband, and this whether the marriage is valid, or *de facto* only.

This, as we have seen, is well illustrated in the present case, and we think that the plaintiff's claim for alimony *ad interim* is as meritorious as it would be were she suing for any other cause of divorce.

2. The defendant further objects to the order of his honor, on the ground that notice of this motion was not given as required by law. Granting that the motion could only have been heard in Randolph County, where the action was pending, we are still unable to perceive any force in the defendant's exception. It appears that the defendant and his counsel were both present in Stanly County, before Judge Philips, when he made the order continuing the motion, to be heard at the March term of the superior court of Randolph County. No particular day was named, but the defendant had notice that the motion would be heard at that term. The statute does not require that a day shall be set when a motion in the cause is to be heard at term. It only provides that five days' notice shall be given; and we think that this requirement was fully complied with in the present case. It is not insisted that the defendant did not in fact know that his case would be heard during the term. On the contrary, his attorney was present, making the objection, and also insisting that the plaintiff was not entitled to alimony, because there was no valid marriage. We are entirely satisfied that

the defendant had actual notice, and could have filed affidavits, or made any other defense, had he desired to do so.

3. It is further objected, that no facts were found by his honor. This is incorrect, as the court found "the facts set forth in the complaint to be true." These facts are amply sufficient to sustain the order for alimony *pendente lite*. Upon a careful review of the whole case, we are of the opinion that there is.

Affirmed.

MARRIAGE AND DIVORCE—ALLOWANCE OF ALIMONY.—The second wife is entitled to alimony, when blameless, even though the husband's first wife is living and undivorced; *Strode v. Strode*, 3 Bush, 227; 96 Am. Dec. 211, and note. But compare *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460.

STATE v. MOORE.

[104 NORTH CAROLINA, 714.]

THE POLICE POWER OF THE STATE is the authority, vested in the legislature by the constitution, to enact all such wholesome and reasonable laws, not in conflict with the constitution of the state or the United States, as they may deem conducive to the public good.

CONSTITUTIONAL LAW.—IN DETERMINING WHETHER A STATUTE IS VOID BECAUSE IN CONFLICT with the constitution of the state or of the United States, the courts will resolve every doubt in favor of the validity of the law, and presume that it was passed in good faith to remedy some defect not reached or corrected by previous legislation.

A PUBLIC LOCAL LAW, if it operates uniformly and subjects all persons who come within the defined locality to its provisions, is valid.

JUDICIAL NOTICE.—The courts will take judicial notice that, owing to the nature of cotton as a growing crop, and the usual methods adopted in gathering and ginning, it is peculiarly exposed to theft until it is baled.

THE POLICE POWER UNDER OUR SYSTEM OF GOVERNMENT HAS BEEN LEFT TO THE STATES, and the only limit to its exercise in the enactment of laws is, that they shall not prove repugnant to the provisions of the state or national constitution.

CONSTITUTIONAL LAW—STATUTE REGULATING SALE OF COTTON IN THE SEED.

—A statute is constitutional which declares that it shall be unlawful for any person to sell, deliver, or receive for a price cotton in the seed, where the quantity is less than what is usually contained in a bale, unless such sale shall be in writing, signed by all the parties thereto, and witnessed by two witnesses, and such writing delivered, with a fee, to the nearest justice of the peace, whose duty it is to docket the same on his civil docket for the inspection of all persons. Such statute does not violate either the fourteenth amendment of the constitution of the United States nor that portion of the constitution of North Carolina forbidding the creation of monopolies or the granting to any man or set of men exclusive or separate emoluments or privileges.

Attorney-general and W. H. Day, for the state.

R. B. Peebles, for the defendant.

EVERY, J. This was an indictment originating before the court of a justice of the peace, and tried on appeal in the superior court of Northampton, at fall term, before Boykin, J., for a violation of chapter 81, Laws of 1887, as amended by chapter 321, Laws of 1889, in selling cotton contrary to the provisions of said chapters.

The jury impaneled in the superior court returned a special verdict, as follows: "We find that the defendant, John E. Moore, at and in the county of Northampton, on the twenty-fifth day of September, 1889, received and purchased of James J. Martin and James Flythe, trading as Flythe and Martin, thirteen pounds of seed-cotton, for which he paid said Flythe and Martin three cents per pound; that said sale was not reduced to writing and no record was made of it, as is required by section 2, chapter 81, Laws of 1887, and that thirteen pounds of cotton is less than what is required to make a bale of cotton; that if, upon this state of facts, the court is of opinion the defendant has violated the law, then we find the defendant guilty as charged; otherwise, we find him not guilty."

The court thereupon directed an entry of "not guilty" to be made, and gave judgment for the defendant. From the ruling of the court, the solicitor, on behalf of the state, appealed.

Section 1 of chapter 81, Laws of 1887, declares that it shall be unlawful for any person to sell, deliver, or receive for a price, etc., any cotton in the seed, where the quantity is less than what is usually baled, except as hereinafter provided.

Section 2 requires that every such sale of seed-cotton shall be in writing, signed by all the parties thereto, and witnessed by two witnesses, in a form laid down in said section, and further, said receipt shall be delivered, with a fee of twenty-five cents, to the nearest justice of the peace, whose duty it shall be to docket the same on his civil docket for the inspection of all persons.

Section 3 of the same act provides that any person buying or receiving seed-cotton contrary to the provisions of this act, etc., shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty dollars, or imprisoned not exceeding thirty days, etc.; provided, that

this act shall only apply to the counties of Anson and Richmond.

Chapter 327 of the Laws of 1889 provides that section 3, chapter 81, of the Laws of 1887, shall be amended by inserting the word "Northampton" after the words "counties of Anson," and before the words "and Richmond."

The attorney-general for the state contended that, under the police power, the general assembly had the right to make it a criminal offense to sell cotton in one of these counties named without complying with the regulations mentioned in the act.

The defendant insisted that the legislature had not the power to pass the acts under which the indictment is drawn, because, —

1. It is in violation of sections 7 and 31 of article 1 of the constitution, which is as follows: "Section 7: No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Section 31: "Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."

2. If the law is not in violation of the constitution of the state, it is in conflict with and is prohibited by the fourteenth amendment to the constitution of the United States.

The police power of the state is the authority, vested in the legislature by the constitution, to enact all such wholesome and reasonable laws, not in conflict with the fundamental laws, — the constitution of the state and the United States, together with laws made in pursuance of it, — as they may deem conducive to public good: *Commonwealth v. Alger*, 7 Cush. 84. The question being whether the law-making branch of the state government has exceeded the limits of its power, as defined in that instrument, it is the duty of the courts to resolve every doubt in favor of the validity of the law, and to presume that it was passed in good faith to remedy, by regulating the manner of selling cotton, some evil not reached or corrected by previous legislation: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350.

We see nothing in the act that confers on any individual or class of persons peculiar privileges or immunities, or that imposes restrictions on any person or class of persons in the disposition of their property, or in making purchases from others. Every citizen of North Carolina who may buy or sell cotton

in the counties of Anson, Northampton, or Richmond is equally amenable to the penalties mentioned in the act, and liable to indictment if he fails to see that a written assignment or bill of sale in the prescribed form is executed, witnessed, and delivered to the nearest justice of the peace.

The statute then comes within the definition of a public local law. Such laws, if they operate uniformly, and subject all persons who come within the defined locality, and violate their provisions, to indictment in the same way and to the same punishment, are not repugnant to the constitution of North Carolina: *State v. Muse*, 4 Dev. & B. 319; *State v. Chambers*, 93 N. C. 600. But the objection that the prohibition is restricted to particular counties is met by a decision of our court that is more directly in point. In *State v. Joyner*, 81 N. C. 534, this court held a statute constitutional that made it indictable for any person, except a manufacturer, to sell intoxicating liquors in the county of Northampton, and declared the manufacturer guilty of a misdemeanor if he sold less than a quart, because it did not discriminate in favor of or against any citizen in the state. In the case of *State v. Stovall*, 103 N. C. 416, a provision in the act incorporating an agricultural society, that it should be unlawful for any person to sell, or offer for sale, any liquors, tobacco, or other refreshments within one half mile of the ground of said society during the week of their annual fair, except persons doing regular business within the prohibited territory, was held consistent with both sections 7 and 31, article 1, of the constitution. In the case of *Intendant v. Sorrell*, 1 Jones, 49, an ordinance requiring oats to be weighed by the public weigh-master before being offered for sale in the city of Raleigh, and imposing a penalty for its violation, was held constitutional. It was decided by the court to be a law to regulate trade, as distinguished from one in restraint of it, like the grant in a city charter of the authority to prescribe rules governing the sale of articles of food in the markets.

The courts can take judicial notice of the fact that, owing to the nature of cotton as a growing crop, and the usual methods adopted in gathering and ginning, it is peculiarly exposed to theft until it is baled. It seems that section 1006 of the code, forbidding the sale of cotton in the seed, or lint-cotton in quantities less than a bale, between the hours of sunset and sunrise, was intended to protect planters of cotton by withdrawing the temptation offered to dishonest

men to take from their fields, storehouses, and gin-houses a valuable product that is so difficult to identify and reclaim, and to sell it to dealers under the cover of darkness. It is the duty of the courts to assume that the legislature enacts laws with a view to the public benefit. We must presume that the provision of the code referred to was, in the opinion of the general assembly, insufficient to afford adequate protection to the producers of this great staple in those counties mentioned in the law under which the bill of indictment was drawn, and therefore persons who disposed of small quantities of loose cotton, even in daylight, were required to execute a receipt that might prove valuable in tracing the movements of a thief. We can see how the law might have been enacted with a view to afford necessary protection to property, and when it proposes upon its face to mete out the same punishment for violation of its provisions to the seller and buyer, we cannot go behind the manifest meaning of the act, according to all legal rules of construction, and hunt for a hidden intent, under the guise of regulating trade, to restrict the rights of any class of persons to enjoy the fruits of their own labor: *Powell v. Commonwealth*, 114 Pa. St. 276; 60 Am. Rep. 350; *Soon Hing v. Crowley*, 113 U. S. 703. A statute declaring it unlawful within certain counties to transport or move after sunset and before sunrise any cotton in the seed has been declared constitutional and valid as an exercise of the police power by the appellate court of Alabama: *Davis v. State*, 68 Ala. 58; 44 Am. Rep. 128.

Speaking of laws that apply only to particular localities or particular classes, Judge Cooley says: "If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply, and that they are public in their character, and of their propriety and policy the legislature must judge": Cooley's Constitutional Limitations, 390, *596.

Though this court was the first in the American Union to assert and exercise the salutary power to declare an act of the legislature unconstitutional, it has since shown its conservative spirit by refusing to pass upon or question the power of a co-ordinate branch of the state government, equal in dignity, and clothed with more extensive discretionary power, except when the violation of the organic law was palpable.

The police power, under our federal system of government,

has been left with the states, and the only limit to its exercise in the enactment of laws by their legislatures is, that they shall not prove repugnant to the provisions of the fundamental law, — the state constitution and the federal constitution, with the laws made under its delegated powers: Cooley's Constitutional Limitations, *574. The extent to which state laws have been sustained, when enacted under this reserved power, will appear by reference to a few leading cases: *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Bertholf v. O'Reilly*, 74 N. Y. 509; 30 Am. Rep. 323; *Woods v. State*, 36 Ark. 36; 38 Am. Rep. 22; *State v. Mugler*, 29 Kan. 252; 44 Am. Rep. 634; *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140; *City of New Orleans v. Stafford*, 27 La. Ann. 417; 21 Am. Rep. 563; *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625; Cooley's Constitutional Limitations, 587, 595.

It remains to discuss the other position, that the statute under consideration is in conflict with the fourteenth amendment of the constitution of the United States. If we have shown, by the authorities cited and reasons adduced, that such local legislation does not come within the inhibition of the organic law of the state against a grant of "exclusive or separate emoluments or privileges," or the toleration of monopolies, when every citizen who comes within the sphere of its operation is alike amenable for a violation of its provisions, it would follow that it could not be declared void because it abridges the privileges or immunities of any citizen or class of citizens of the United States. The supreme court of the United States has so held in a number of cases: *Missouri v. Lewis*, 101 U. S. 22; *Mugler v. Kansas*, 123 U. S. 663.

The states did not originally delegate to the government of the United States the power to protect the citizens of the state, and the duty originally assumed by the states of guaranteeing equal rights to all remains still equally as binding as an obligation and unimpaired as a right as when the federal constitution was adopted. The fourteenth amendment extends the right of citizenship in the state and nation to all persons born or naturalized in the United States, and subject to the jurisdiction thereof, and assumes for the federal government the obligation to protect all such citizens against oppression under any law enacted by a state that abridges their privileges or immunities, deprives them of life, liberty, or property without due process of law, or denies to them the

equal protection of the law: *United States v. Cruikshank*, 92 U. S. 542.

It has been held by the supreme court of the United States that no legislation is open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates, and is enforceable in the usual modes established in the administration of government, with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case: *Dent v. West Virginia*, 129 U. S. 114, and cases cited. It will be admitted that the act under which the defendant is indicted not only operates generally upon all persons and classes who violate its provisions, but by its terms is enforceable against all by a criminal prosecution conducted in the usual way, and therefore it is not repugnant to section 1 of the fourteenth amendment to the constitution of the United States. In further corroboration of this view, we may quote the language used by the court in *Mugler v. Kansas*, 123 U. S. 623: "But this court has declared, upon full consideration in *Barbier v. Connolly*, 113 U. S. 27, the fourteenth amendment had no such effect." After observing, among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment, — broad and comprehensive, as it is, — nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

Two of the authorities cited in support of the defendant's contention (*In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and concurring opinion of Justice Field in *Bartemeyer v. Iowa*, 18 Wall. 137) tend to establish the doctrine, on the one hand, that the legislature cannot prohibit one from carrying on a lawful occupation under the guise, which is palpably false, of protecting the public health, because it is a law in restraint of trade, nor on the other, prohibit the sale or use of property already in one's possession, because the denial of the right of enjoying it, or disposing of it, is depriving the owner of property without

due process of law. Granting that the first of these positions is tenable, the principle is not at all analogous to that which governs our case. There can be no question about the right of the state to regulate the manner of selling any article produced or manufactured within its borders, in any portion of its territory, with the purpose, apparent from the terms of the law, of protecting the manufacturer or producer against fraud or dishonesty: *Cooley's Constitutional Limitations*, *587; *Tiedeman's Limitations of Police Power*, sec. 89.

It is a rule, founded on reason and supported by authority (as we have already intimated), that we should hold the apparent purpose of the law to be the real objects aimed at by a co-ordinate branch of the state government, whose duty it is to provide for the protection of its citizens.

Upon the same principle as that announced in *Jacobs's case*, the court of appeals of New York, in the case of *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, declared an act unconstitutional which prohibited the manufacture of what is commonly called oleomargarine, whether it was so made as to be wholesome food or not. On the other hand, the supreme court of Pennsylvania decided that a law containing a similar prohibition was clearly constitutional, and valid as an exercise of the police power: *Powell v. Commonwealth*, 114 Pa. 285; 60 Am. Rep. 350.

But whatever may be the proper construction of the laws similar in their provisions to those found in New York or Pennsylvania, or whether they shall be ultimately held by our courts valid or invalid, the production of cotton is not forbidden, nor the mode of its culture prescribed, and the sale of it is not prohibited, but regulated, by the act of 1887 as amended by the act of 1889, and there is therefore no analogy between the cases.

There was error in the holding that the defendant was not guilty. Let this opinion be certified, to the end that a verdict of guilty be entered.

Error.

POLICE POWER. — For a definition of what police power is, see *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460, and note; *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813.

STATUTES — CONSTRUCTION OF. — The courts will always put such a construction upon a statute as will make it valid, when it is possible to do so: *People v. Terry*, 108 N. Y. 1; *San Diego v. Grannis*, 77 Cal. 511; *Wenger v. Taylor*, 39 Kan. 754.

STATUTES. — What are local and special statutes: Note to *Allen v. Pioneer Press Co.*, 12 Am. St. Rep. 716.

STATE V. CALLEY.

[194 NORTH CAROLINA, 352.]

CRIMINAL LAW — BAWDY-HOUSE, KEEPING OF. — An indictment against a woman for the keeping of a bawdy-house is not sustained by proof that both she and her daughters, who resided with her, were lewd women, and she and they, with her knowledge, frequently had sexual intercourse, in and about her house, with men other than their husbands.

CRIMINAL LAW — BAWDY-HOUSE. — The living together of lewd women, doing acts of prostitution in their house, or in the house of one of them, does not constitute the offense of keeping a bawdy-house.

CRIMINAL LAW — DISORDERLY HOUSE. — The crime of keeping a disorderly house is not established against a woman by proof that she and her daughters, who resided with her, committed frequent acts of prostitution, which acts were not committed in so public a manner as to disturb the neighborhood or passers-by.

Attorney-general, for the state.

M. L. McCorkle and F. L. Cline, for the defendant.

MERRIMON, C. J. This is a criminal action, which was tried at January term, 1889, of Catawba superior court, Clark, J., presiding.

The indictment charges the defendant in the first count with keeping a bawdy-house, and in a second count with keeping a disorderly house. The evidence produced on the trial went to prove that on one occasion, at night, a witness saw a man in the house of the defendant in bed with one of her daughters; that at that time the defendant was in a room below stairs; that at another time a witness went to the house at night, got drunk on whisky he did not get there, and lay across a bed until four o'clock next morning, and when he awoke he saw a man in bed with a daughter of the defendant, and also a man in bed with herself in another room; that at another time, at night, a witness saw the defendant along the big road, near her house, having sexual intercourse with a man; that a daughter of the defendant had a bastard child about eighteen months old. This was the substance of the evidence adverse to the defendant. She insisted that it was not sufficient to go to the jury to prove her guilt. The court held otherwise, and she excepted. There was a verdict of guilty and judgment against her, from which she appealed.

Accepting the evidence as true, the defendant was guilty of reprehensible, vicious, and disgraceful conduct on repeated occasions, but it did not prove, in any reasonable view of it, that she kept, in a legal sense, a bawdy-house,—a house as a

habitation for prostitutes,—a house of ill-fame, kept as a place of common resort and convenience of lascivious and lewd people of both sexes. It proved that she was a woman of loose morals,—a lewd woman; that she sometimes—it might be inferred frequently—had sexual connection with men in and about her house, and her daughters did likewise, with her knowledge; but it did not prove that her house was a place of common resort for prostitutes and lewd people of both sexes. She and her daughter were lewd women, doing acts of prostitution in her own house. This does not make the offense of keeping a bawdy-house: *State v. Evans*, 5 Ired. 603; 1 Bishop's Crim. Law, secs. 1037, 1038.

Nor do we think the evidence sufficient to prove that the defendant kept a disorderly house, as charged in the indictment. It was not sufficient to prove the nuisance charged. It did not appear, from any reasonable view of it, that she lived in a town or thickly settled neighborhood; that she kept a drinking-place; that drinking and drunken men and women, from time to time, assembled there, as well in the night as in the day; that many such dissolute people frequently resorted thither "to be and remain drinking, tippling, cursing, quarreling, and otherwise misbehaving themselves," as charged, or that the neighborhood or passers-by or about there were at all disturbed, or that they knew of the immoral conduct of the defendant and her daughter in the house of the former: *State v. White*, 89 N. C. 462; *State v. James*, 90 N. C. 702; *State v. Atkinson*, 93 N. C. 519.

It is keeping the house in such way and manner—helping, encouraging, permitting, or tolerating such pernicious acts, things, transactions, and practices in and about it—as creates an evil example to be seen, annoys, disgusts, scandalizes, shocks the moral sense, offends against the decencies and proprieties of the public generally, or the people of a particular neighborhood or vicinity, or the passers-by on a particular highway, that create and constitute the nuisance charged. As we have seen, the evidence did not prove such facts, or the substance of them. It proved little more than that the defendant and her daughter were whorish persons in and about the house of the former, of whose immoral practices the people generally in the vicinity and passers-by saw and knew but little, if anything, by observation or common reputation. It may be that the facts were far otherwise, to the great grievance of the community in which they occurred, but the evi-

dence produced on the trial, as it comes to us, was not sufficient to so prove them: *State v. Patterson*, 7 Ired. 70; 45 Am. Dec. 506; *State v. Wright*, 6 Jones, 25; *State v. Robertson*, 86 N. C. 628; *State v. Wilson*, 93 N. C. 608.

The court should have told the jury that the evidence produced was not sufficient to warrant the conviction of the defendant, and to render a verdict of not guilty. As it did not, there is error, and the defendant is entitled to a new trial. To that end, let this opinion be certified to the superior court according to law.

CRIMINAL LAW — DISORDERLY HOUSE — WHAT CONSTITUTES THE OFFENSE. — A house is disorderly which tends to public annoyance, although only one person may have been actually disturbed: *Commonwealth v. Hopkins*, 133 Mass. 381; 43 Am. Rep. 527.

STATE v. MILLS.

[104 NORTH CAROLINA, 906.]

CRIMINAL LAW — FORCIBLE ENTRY. — To constitute offense of forcible entry or forcible trespass, there must be either actual violence used, or such demonstration of force as is calculated to intimidate or alarm, or as involves or tends to a breach of the peace. Hence the offense is not established by proof that the defendant went to a house occupied by the plaintiff, said it was his, that he intended to take possession of it, and, though forbidden by plaintiff to enter, entered such house, whereupon the plaintiff, to avoid a difficulty, went away, leaving the defendant in possession.

INDICTMENT for forcible entry. At the trial the jury returned the following special verdict: "One Perry Bommer was the tenant occupying the house of T. T. Ballinger and others, and about the first day of January, 1889, went to said Ballinger, and told him that he was going to move, and that he (Ballinger) might come and take possession of the house. Ballinger went to the house, went in, and began nailing down the windows. While he was thus engaged in the house, the defendant, W. E. Mills, came, accompanied by an old negro man, who carried some things Mills intended to put in the house. Mills came to the door of the house, and said to Ballinger, 'This is my house, and I mean to take possession of it.' Ballinger forbade Mills to enter, but Mills went into the house. The reason Ballinger allowed Mills to go into the house was to avoid a difficulty. The defendant said that, as he entered the house, one Garrison, from whom Ballinger and another had

purchased the house, was, or had acted, a damned rascal; that it was his (defendant's) house, and he was going to have it. . . . Ballinger made no effort to keep Mills out, except to forbid him, in a quiet way, to enter. The negro man accompanied Mills in, and Mills said to the negro, 'Bring those things in here and throw them down,' and the negro did so. Mills did not curse Ballinger, or threaten to use any violence, — had no weapon. In reply to what Mills said about Garrison, Ballinger told him that 'if there was any trouble between him and Garrison, they could fight their own battles.' Ballinger then went away and left Mills in possession." The trial court was of the opinion that the special verdict was equivalent to a verdict of not guilty, and directed the discharge of defendant, and that the prosecutor pay the costs. The state thereupon appealed.

Attorney-general and W. J. Montgomery, for the state.

J. A. Forney, for the defendant.

CLARK, J. To constitute the offense of forcible trespass, there must be either actual violence used, or such demonstration of force as was calculated to intimidate or alarm, or involve or tend to a breach of the peace: *State v. Pearman*, Phill. (N. C.) 371. The show of force must be such as to create a reasonable apprehension in the adversary that he must yield to avoid a breach of the peace: *State v. Pollok*, 4 Ired. 305; 42 Am. Dec. 140. In the present case, there was neither display of weapons, threats of violence, nor unusual numbers. There was nothing said or done which should have intimidated or overawed a man of ordinary firmness.

In *State v. Covington*, 70 N. C. 71, Bynum, J., states the law so clearly, and in a case so like ours, that it is only necessary to cite it. In it he says that bare words, however violent, cannot constitute the offense, and though words accompanied by display of weapons, by numbers, or other signs of force, are sufficient, yet the demonstration of force must be such as is calculated to intimidate, or create a breach of peace, and adds: "The law does not allow its aid to be invoked, by indictment, for rudeness of language, or even slight demonstrations of force, against which ordinary firmness will be a sufficient protection." This case has been cited with approval in *State v. Lloyd*, 85 N. C. 573. In *State v. Hinson*, 83 N. C. 640, which was chiefly relied on by the state, the act of riding into the yard of a house occupied only by a

woman, after being forbidden by her, and remaining there cursing her, was held such demonstration of force as was calculated to intimidate or put her in fear.

It is true that here defendant left to avoid a breach of the peace, but the demonstration of force was not such as to give him reasonable ground for apprehension, nor to intimidate him. The facts stated in the special verdict make only a bare civil trespass, or at most, an "entry upon land after being forbidden." The defendant would not be guilty of the latter if he entered under a reasonable *bona fide* belief that he had the right to do so: *State v. Winslow*, 95 N. C. 649.

In *State v. Ross*, 4 Jones, 315, 69 Am. Dec. 751, Pearson, J., adverts to the fact that unless the demonstration of force is such as is calculated to put in fear or create a breach of the peace, it is no more than a civil trespass, and adds: "The courts should keep a steady eye to this distinction, because individuals are under great temptation to convert civil injuries into public wrongs, for the sake of becoming witnesses in their own cases and saving costs." Many eminent judges have given caution against this growing tendency to settle private quarrels at public expense: *State v. Lloyd*, 85 N. C. 573.

No error.

FORCIBLE ENTRY — WHAT CONSTITUTES. — Forcible trespass can only be committed by a demonstration of force amounting to a breach of the peace, or directly tending to it, or such force as is calculated to intimidate or put in fear: Note to *State v. Ross*, 69 Am. Dec. 756.

CASES

OF THE

SUPREME COURT

OF

OREGON.

COOKE v. COOPER.

[18 OREGON, 142.]

MORTGAGE — VOID FORECLOSURE SALE — EFFECT ON PURCHASER OR HIS GRANTEE. — Where a mortgagee becomes the purchaser of the mortgaged property at a void foreclosure sale, obtains his deed, enters into possession, and then conveys the premises, his grantee, or any successor in interest of the latter, is an assignee of the mortgage debt and mortgage, and considered as a mortgagee in possession.

MORTGAGE — RIGHTS OF MORTGAGEE IN POSSESSION AFTER DEFAULT. —

While a mortgagee cannot maintain a possessory action to recover possession of the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may thereafter maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt.

MORTGAGE — RIGHT OF MORTGAGEE IN POSSESSION TO REMOVE BUILDINGS.

— A mortgagee in possession is not to be treated as a mere stranger who goes upon the land of another, and places improvements there without the consent of the owner; but he may lawfully take down and carry away any buildings erected by him on the mortgaged land, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it.

MORTGAGE — MORTGAGEE IN POSSESSION, with the right to remove a building from the mortgaged premises, may exercise the right without a resort to equity.

Nicholas and Deady, and Gearin and Gilbert, for the appellant.

Moreland and Masters, for the respondents.

STRAHAN, J. This cause was tried by the court below without the intervention of a jury, and the only questions of law

we are required to consider arise upon the findings, which are as follows:—

"1. That A. C. McDonald, named in the complaint, died intestate on the twenty-first day of September, 1878, seised and possessed at the time of his death of the real property mentioned in the complaint, and described as lots one (1) and two (2), in block 120, Stephens's addition to East Portland, Multnomah County, Oregon.

"2. That said A. C. McDonald and his wife, on the twenty-third day of March, 1878, to secure the payment of part of the purchase price of the aforesaid real property, for which said A. C. McDonald had given his promissory note, executed and delivered to B. Boeschen, their vendor, a mortgage on said real property, which debt and mortgage was not paid at the date of the death of said A. C. McDonald.

"3. That on the twenty-fifth day of August, 1879, said B. Boeschen commenced a suit in this court, in the equity department thereof, against the widow and heirs of said A. C. McDonald, deceased, to foreclose said mortgage, though no administration of the estate of said deceased had been had, nor any administrator appointed for said estate, and said mortgage had not been nor has it yet been recorded; that a supposed service of summons in said suit was made on the defendants therein, by publication, as against non-residents, and a decree of foreclosure regular in form was made and rendered by this court in said suit on the fifteenth day of October, 1879.

"4. That pursuant to the decree of foreclosure in said suit, the lands in said mortgage described, being the same lots 1 and 2, in block 120, in Stephens's addition to East Portland, in this county, which are mentioned in the complaint herein, were sold at sheriff's sale on the twenty-second day of November, 1879, and were bid off by said B. Boeschen; and said sale having been duly approved by this court, a deed for said lots was in due form made by the sheriff to said Boeschen, which purported to convey to said Boeschen all the right, title, estate, and interest which said A. C. McDonald had in said lots at the time of his death, which deed was duly recorded in the records of deeds for this county.

"5. That said lots passed by a regular chain of conveyances, as alleged in the answer, from said B. Boeschen to the defendant Martin L. Cooper's intestate, the said George Cooper, deceased; the several purchasers under said Boeschen down to

George Cooper entering into possession of said lots, and exercising rights of ownership over the same.

"6. That said George Cooper's immediate vendors were in actual possession of said lots, and said George Cooper took the advice of counsel concerning the title to said lots, and procured an abstract of the title thereof to be made, and the certificate of reputable attorneys of this court, declaring the title of the Forbeses, the immediate vendors of said George Cooper in and to said lots, to be good, and in fee-simple; and said George Cooper thereupon purchased said lots, and paid the full value thereof in cash, and took a deed therefor, and went into the actual possession of the same on or about the seventeenth day of March, 1885, in good faith, and fully believing that he had a good title thereto, and wholly ignorant of any adverse title thereto.

"7. That while said George Cooper was in possession of said lots, to wit, in the year 1886, he built upon said lots the dwelling-house described in the complaint, with material and funds wholly his own, and in good faith, without notice of any adverse title, and verily believing that he was the owner in fee of said lots, and of the whole thereof.

"8. That on June 25, 1887, an action was begun in the circuit court of the United States for the district of Oregon, against said George Cooper, by Angus McDonald, heir at law of said A. C. McDonald, in which said action said plaintiff, Angus McDonald, claimed to be owner in fee of said lots hereinbefore mentioned, and demanded possession of the same; and said United States circuit court, having jurisdiction, did, in said action, on the twenty-eighth day of November, 1887, adjudge that said Angus McDonald was owner in fee of said lots, and in possession thereof, and did, in substance and effect, adjudge that said George Cooper had no title to said lots, and that the decree of this court in the hereinbefore described suit of Boeschen v. McDonald, and the sheriff's deed aforesaid to said Boeschen, were invalid and of no effect.

"9. That while said action in said United States circuit court was pending, and two days before said judgment therein had been rendered, to wit, on the twenty-sixth day of November, 1887, the said George Cooper, the defendant Martin L. Cooper's intestate, being still in possession of said lots, caused said dwelling erected by him as aforesaid on said lots to be removed therefrom, and had the same, on the said twenty-sixth day of November, 1887, on the street near said lots, and

afterwards removed the same, and placed it upon another lot belonging to said George Cooper, in the same block, and that in and by said removal of said house from said lots no injury was done to the soil of said lots, nor was there any injury to the inheritance, and said George Cooper removed nothing from said lots except what he had himself and with his own means placed thereon.

"10. That the value of said house at the time of removal was seven hundred dollars (\$700).

"11. That said defendant W. O. Allen did not remove, nor aid or assist or advise or encourage any other person to remove, said house; that said Martin L. Cooper, defendant, did employ men to remove said house, and did direct them in regard to the same; but that said Martin L. Cooper, in all that he did in and about the removal of said house, was only the agent for, and acted only for and in behalf of, said George Cooper, his intestate."

As conclusions of law, the court finds, from the foregoing facts:—

"1. That the plaintiff is not entitled to recover from any of the defendants any sum whatever for said house, or the removal of the same.

"2. That the defendants are entitled to judgment that they go without day, and recover their costs and disbursements from the plaintiff.

E. D. SHATTUCK, Judge."

"SUPPLEMENTAL FINDINGS.

"That said mortgage mentioned in finding of fact No. 2 was not produced at the trial of this action, although due notice was served upon defendant and his attorneys to produce the same, nor was its absence accounted for other than by the statement by witness (Moreland) that he had it when foreclosure suit was pending, and had looked for it since this action was begun, but that it could not be found, and that said mortgage was never recorded in the office of the county clerk of Multnomah County, Oregon.

"E. D. SHATTUCK, Judge."

1. It does not affirmatively appear, from the findings of the court below, for what reason the United States circuit court for the district of Oregon adjudged the title to the premises described to be in the heir of A. C. McDonald, but no doubt it was on the ground that the circuit court in which the foreclosure proceedings were had failed to acquire jurisdiction

over the heir at law of A. C. McDonald, deceased. Nor is it material, in the form in which this record is presented. The findings, in effect, show that there was an attempted foreclosure, followed by a sale of the property; that such sale was approved by the court, and a proper deed executed to Boeschen, the plaintiff and mortgagee, who became the purchaser at the sale, and entered into the possession by virtue of said deed. He subsequently sold his interest in said premises, which passed with the possession thereof by mesne conveyances to George Cooper, who erected the house thereon. These conveyances, if they failed to pass title to the lots described, operated as an assignment of Boeschen's mortgage to the successive grantees named in said several deeds: *Robinson v. Ryan*, 25 N. Y. 320; *Winslow v. Clark*, 47 N. Y. 261; *Miner v. Beekman*, 50 N. Y. 337; *Murdock v. Chapman*, 9 Gray, 156; *Hinds v. Ballou*, 44 N. H. 619; *Smith v. Smith*, 15 N. H. 55; *Lamprey v. Mudd*, 29 N. H. 299. If the Boeschen mortgage was not foreclosed, it remained in full force and unsatisfied, and by the conveyances set out in the findings was owned by George Cooper at the time he placed the erections on the lots, and in such case his relation to the lots was that of a mortgagee in possession.

I am aware that it was said by this court in *Roberts v. Sutherlin*, 4 Or. 219, that a mortgagee who obtains possession of the mortgaged premises with the assent of the mortgagor after default of the latter may retain such possession until payment of the mortgage debt. Such possession is a good defense against an action of ejectment brought by the mortgagor, so long as the mortgage debt remains unpaid. This is a correct statement of the law as far as it goes, but it does not go far enough. It is true, Hill's Code, section 326, provides: "A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law." This provision of the statute is copied from the Revised Statutes of the state of New York: 2 R. S., p. 312, sec. 57; but after the enactment of this statute it was held in that state that "if the mortgagor, after forfeiture, entered into possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there, at least till his debt is paid": *Van Duyne v. Thayre*, 14 Wend. 234. So it was said in *Phyfe v. Riley*, 15 Wend. 248; 30 Am. Dec. 55: "Now, by the Revised Statutes, the mortgagee must

complete his title by other proceedings before he brings his suit; but if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action, why should the mortgagor, or those claiming under him, recover the possession from the mortgagee without paying the money secured by it?" *Miner v. Beekman*, 50 N. Y. 337, was a case where the mortgagee bid off the mortgaged premises at a void foreclosure sale, and entered into the possession of the premises, and the court held if the defendants had acquired the rights of the mortgagee they could defend their possession by virtue of the mortgage. So *Shriver v. Shriver*, 86 N. Y. 575, was also a void foreclosure, by reason of the owner of the property not having been made a party to the suit; and at the attempted sale under the decree, a stranger, and not the mortgagee, became the purchaser, and entered into the possession, and the court, by Folger, C. J., said, distinguishing the case from *Miner v. Beekman*, 50 N. Y. 337: "The case is supposed to be like that of *Miner v. Beekman*, 50 N. Y. 337. It is different in an important particular. There the entry was by the mortgagee, who was also the purchaser at the sale. He thus became a mortgagee in possession, and could defend against the owner of the equity of redemption, or his representative, any action, except one for an accounting of the rents and profits, and to redeem." And this seems to be the settled rule in New York: *Casey v. Buttolph*, 12 Barb. 637; *St. John v. Bumpstead*, 17 Barb. 100; *Munro v. Merchant*, 26 Barb. 383; *Winslow v. McCall*, 32 Barb. 241; *Randall v. Raab*, 2 Abb. Pr. 307; *Jackson v. Bowen*, 7 Cow. 13; *Watson v. Spence*, 20 Wend. 260; *Madison Ave. Baptist Church v. Baptist Church in Oliver St.*, 73 N. Y. 82; *Trimm v. Marsh*, 54 N. Y. 599; 13 Am. Rep. 623; *Pell v. Ulmar*, 18 N. Y. 139; *Craft v. Merrill*, 14 N. Y. 456. And in such case it seems that an entry by the mortgagee, after condition broken, without actual force, is sufficient. In *Pell v. Ulmar*, 18 N. Y. 139, it is said: "Formerly, the mortgagee could maintain ejectment, but this is prohibited by the Revised Statutes: 2 R. S., p. 312, sec. 57. If, however, the mortgagee obtains possession without force, he is entitled, as well since as before the statute, to hold it against the mortgagor: *Van Duyne v. Thayre*, 14 Wend. 233; *Phyfe v. Riley*, 15 Wend. 248; 30 Am. Dec. 55; *Watson v. Spence*, 20 Wend. 260; *Fox v. Lipe*, 24 Wend. 164; *Olmsted v. Elder*, 2 Sand. 325." On the point under consideration, these authorities are fully approved by the court.

It results, therefore, that while a mortgagee is not permitted

to maintain a possessory action to recover the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may maintain such possession against the mortgagor, and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. This view of the law in no manner interferes with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law, which have sometimes been permitted to prevail, and the mortgagee turned out of possession, stripped both of the property and his mortgage debt as well.

2. Having reached the conclusion that George Cooper, at the time of the removal of the house mentioned in the pleadings, was a mortgagee in possession, he is not to be treated as a mere stranger would be, who went upon the land of another and placed improvements there without the consent of the owner. The rights of a mortgagee in possession who had placed improvements on the mortgaged premises came directly before the court in *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107, where it was held that a mortgagee, after a recovery on a bill in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it. And Ewell on Fixtures, 287, says, in reference to this case, that the same rule was here apparently applied as in the relation of landlord and tenant, and to this we see no objection. This party owned the materials used in the construction of that house. He did not intend to part with their ownership. He acted in good faith in placing them on another's land while he was in the lawful possession under the belief that he owned the same, and upon the discovery of his mistake, removed his structure from the land without injury to it, and before he was ousted. I confess it is difficult to see the justice of a rule of law that could by mere construction thus take one man's property and give it to another, or, what seems still more repugnant to every sense of right, to compel a party to pay for his own property. But there is authority for carrying the principle of the right to remove even further. In *Tyler v. Decker*, 10 Cal. 435, D. purchased a lot of land at

sheriff's sale on execution, and entered into possession, and erected certain buildings thereon, and afterwards removed the buildings. On the same day the buildings were removed, the defendants in the execution sold the premises to T., and a day or two afterwards T. redeemed the lot from the sale, and then brought suit against D. to recover the value of the buildings. Held, that as there was no evidence that the buildings were attached to the soil, T. could not recover. *Little v. Willford*, 31 Minn. 173, is a case where a party made a deed of certain lands to "the trustees of the Methodist Episcopal Church for Elgin circuit," for a church building, upon which a building was erected, and the title failing because no grantees were named in the deed, it was held the building was properly removable. So in *Wickliffe v. Clay*, 1 Dana, 585, it was decided that where one was in possession of land held *bona fide* as his own, and had erected buildings thereon, he (or those claiming under him) might remove them without incurring any responsibility to the owner of the paramount title.

It was argued by counsel for the appellant that while it might be true that George Cooper would in equity have been entitled to claim compensation for the house placed on the land, or possibly to have been entitled to retain the possession of the property until he had been paid for his improvements, as in *Hatcher v. Briggs*, 6 Or. 31, the right is purely equitable in its nature, and must be sought in that form only. If George Cooper's heirs or legal representative were seeking compensation for betterments placed upon another's lands by him in his lifetime, no doubt appellant's contention might be sustained. If the improvements were of such a nature that they were not removable, such as grubbing, clearing land, and the like, as in *Hatcher v. Briggs*, 6 Or. 31, then the only remedy open to him would be in equity, where complete relief would be administered on equitable principles; but when he has simply placed his own chattels on such lands under the honest belief that he owned such lands, and had reason so to believe, and acted in good faith in the matter, and upon the discovery of the true *status* of the title he removes such chattels, though they have been erected into a house, it is not perceived that he has in any manner injured the plaintiff, or that equity could be successfully invoked in such case. There is no occasion for the interposition of equity, for the reason that such party has exercised the right to remove his chattel, and he has no cause of suit against the owner of the land.

These conclusions lead to an affirmance of the judgment of the court below, and it is so ordered.

MORTGAGE — RIGHTS OF MORTGAGEE IN POSSESSION AFTER DEFAULT. — A mortgagee in possession after forfeiture may retain such possession as against the mortgagor, and defend the same in an action of ejectment by the mortgagor: Note to *Phyfe v. Riley*, 30 Am. Dec. 60. A mortgagee in lawful possession cannot be ousted by one claiming under the mortgagor until the mortgage is satisfied: *Bosse v. Johnson*, 73 Tex. 608.

MOAKLER v. WILLAMETTE VALLEY RAILWAY CO.

[18 OREGON, 189.]

NEGLIGENCE. — A PASSENGER'S RESTING HIS ARM ON THE WINDOW-SILL of the open window of a car, with his elbow slightly projecting outside, is not negligence *per se*, irrespective of the fact whether an injury to him occurred to the exposed part of the arm, or not.

NEGLIGENCE IS GENERALLY A QUESTION OF FACT to be decided upon all circumstances, and the court ought not to declare it, as matter of law, unless there is a plain act of carelessness upon the part of the plaintiff contributing to his injury.

NEGLIGENCE, WHEN QUESTION OF FACT. — Where a passenger riding with his arm resting on the window-sill of an open window of a car, with his hand inside, but his elbow extending a few inches outside the window, is struck by a stick of cord-wood falling from a pile near the track, through the window, upon the palm of his hand, or near it, so as to catch in the mouth of his coat-sleeve, and jam his arm backward, breaking it, and badly lacerating his hand and arm, the facts are not such as will authorize the court in declaring the act of the passenger to be negligence *per se*, and ordering a nonsuit. The question of contributory negligence on the part of the passenger should be left to the jury.

C. H. Carey, and Mitchell and Tanner, for the appellant.

C. J. McDougall, for the respondent.

LORD, J. This is an action brought by the plaintiff to recover damages for an injury alleged to have been caused by the negligence of the defendant while he was a passenger on one of its trains. By his answer, the defendant denied the negligence alleged, and averred that the negligence of the plaintiff contributed to his injury. To this the plaintiff filed his reply, and issue being thus joined, the trial was proceeded with until the plaintiff rested his case, when the defendant, by his counsel, moved for a judgment of nonsuit, upon the ground that the evidence showed that the plaintiff was guilty of contributory negligence, which the court allowed, and from which the present appeal is taken. Explanatorily, it may

be said that the evidence showed that large piles of wood were corded, at places along the track, about one foot or a foot and a half from the cars, and so high that passengers often could not see out on account of it; that from one of these piles some of the sticks fell upon the cars, and through the window at which the plaintiff was sitting, with his arm resting on the window-sill, causing the injury complained of. As relevant to the point upon which this case must be determined, it is necessary to understand how the injury occurred. Mr. O'Leary, a witness for the plaintiff, testified: "It hit him in the palm of the hand; that is where the wood hit him. It was not on the elbow. The elbow went up against the jamb of the window, and that is what hurt his elbow. Q. How was his hand? A. Probably a few inches out of the window. The force of the stick and the car going, of course, hurt his elbow; that is what done it." On cross-examination, after testifying that the stick came through the open window, in reply to the question that the stick struck him "when his hand was outside," he says: "His hand was inside. It was the wood that hit his hand; it did not hit his elbow. Q. It pressed his hand back this way? A. Pressed it back against the window, and that is what hurt it, — hand inside the window. Q. Elbow outside? A. Yes, sir; I think so. Q. How far did the elbow extend outside? A. May be a few inches; I don't know."

It will be noted that this witness first stated that the plaintiff's hand was "probably a few inches out of the window," but on his cross-examination testifies that it "was inside the window," and that the "elbow was outside" of the window a few inches. Looking at the whole of the evidence, and the manner in which he says the injury occurred, it was probably the elbow to which he referred; and this, too, is consistent with the testimony of the plaintiff, who succeeded him as a witness. After some preliminary matters, the plaintiff testified: "Q. Now, you may state whether or not any part of your arm was projecting outside of the car. A. No, sir; it was right on the window-sill. Q. You say that this falling stick of wood caught in your coat, and jerked your hand out. A. Sitting just like here [explaining by reference to witness-box]; stick struck just here [referring to the mouth of his coat-sleeve], and pulled it out," etc. "I was this way; train going this way; arm on the window right here. The first thing I knew, a piece of wood, coming in, grabbed my coat-sleeve in the mouth of it, something like here, and just

pulled my arm out, and got jammed backwards," etc. "Q. Your arm was resting on the window? A. Resting on the window. [Evidently means resting on the window-sill.] Q. Was your elbow out three or four inches? A. Two or three inches, — may be four inches. Q. Caught in the palm? A. No, sir; in the coat-sleeve, and pulled right out."

It will be observed that both witnesses agree that the hand was inside and that the elbow was outside of the window; that the stick of wood which did the injury came though the open window, and, one says, struck the palm of his hand, and the other, caught in the mouth of his coat-sleeve; but both agree that the stick did not hit the elbow, and as to the manner it operated in jamming the arm backwards and producing the injury. The plaintiff's testimony is, that his arm was resting on the window-sill, but that no part of his arm was outside of the car, although he admitted it was outside of the window. This must be based on the idea that the window-sill slightly extended beyond the exterior surface of the car. The truth is, it is generally difficult to reconcile the testimony in cases of this character, and reach a state of facts not disputed and beyond the reach of controversy. At any rate, in our judgment, the evidence submitted by the plaintiff tended substantially to establish this state of facts: That the plaintiff, while riding as a passenger on one of the defendant's trains, rested his arm on the window-sill of an open window, with his hand inside, but his elbow extending a few inches outside of the window; that alongside of the track a great quantity of cord-wood was piled, at places so high as to obscure a view from the window of the cars, and at a distance of a foot or a foot and a half from the cars; that while thus riding some of the sticks of cord-wood fell from the pile, and against the cars, and through the window, upon his palm, or caught in the mouth of his coat-sleeve near the palm, and jammed his arm backward, breaking it, and badly lacerating his arm and hand. As here used, when it is said that the elbow was outside of the window, it is meant that it was outside of the surface of the window, and exposed to injuries from external objects. It was so treated at the argument, and it will be so considered by us.

The inquiry, then, presented by this record is: Do the facts show such an act of contributory negligence on the part of the plaintiff as will prevent a recovery, and make it the duty of the court to so declare as a matter of law, notwithstanding

the negligence of the defendant in permitting the wood to be so carelessly piled near the track of the passing train? "Contributory negligence" is defined to be "a want of ordinary care upon the part of the person injured, by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred": 4 Am. & Eng. Ency. of Law, 17. The law will not permit a recovery where the plaintiff, by his own negligence, has contributed to produce the injury from which he has suffered. "And it matters not," said Mr. Justice Field, "whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong." And he adds, that "it would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer": *Little v. Hackett*, 116 U. S. 371.

To have adjudged the plaintiff guilty of contributory negligence, upon the facts, the court must have found that there was want of ordinary care on his part, and a proximate connection between such want of ordinary care and the injury complained of. Our case, then, is thus put by Mr. Beach: "1. Did the plaintiff exercise ordinary care, under the circumstances? 2. Was there a proximate connection between his act or omission and the hurt he complains of?" Beach on Contributory Negligence, sec. 3, p. 7. If these two questions be answered in the affirmative, the two elements concur which constitute contributory negligence, and, in the sense of the law, the plaintiff is responsible for his own wrong, and is precluded from a recovery.

The facts show that plaintiff's elbow was slightly extended outside of the window, but that the other portion of his arm and hand was inside of the window. The elbow was not hit, but a stick of wood, falling through the open window at which he sat, and upon the sill on which his arm rested, struck the part of the arm inside of the window, and caught in the mouth of the coat-sleeve, which, with the motion of the train, jammed the arm backward against the frame of the window, and produced the injury complained of. Now, it will be noted, — 1.

That although the elbow was outside of the window, it was not hit, and the injury did not arise as the direct consequences of the exposed condition of the elbow to external objects with which it might come in contact by reason thereof; and 2. That the hand and part of the arm which were struck with the stick were within the window. The facts concede that an injury would be likely to happen if the elbow had not been exposed, while the arm continued to rest upon the window-sill in the same relative position. By merely changing the angle of the inclination of the arm, so that the elbow would not be exposed, leaving the arm otherwise in the same relative position, a similar injury would have likely happened or resulted, upon the facts. But in neither case, whether the elbow was inside or outside of the window, is the injury occasioned by or the result of its contact with external objects. Yet this judgment punishes the plaintiff with the same consequences as if the injury resulted from exposing the arm outside of the window to contact with external objects. In that view, it makes no difference whether the arm or elbow is inside or outside of the window when the injury occurred, — the same legal consequences ensue; but this cannot be, unless it be a negligent act to rest the arm on the window-sill of the car, irrespective of the fact whether the injury occurred to the exposed part of the arm or not.

The counsel for the defendant insists that the plaintiff, by exposing his elbow two or three inches out of the window, contributed to produce the injury of which he complains, and that without which he would not have been injured. He places the injury upon the same footing as if it had occurred in consequence of the elbow being struck by reason of its exposure to passing objects external to the car, and, as a consequence, asserts that the conduct of the plaintiff was negligence *in se*, and as such, that it was the undoubted duty of the trial court to grant the nonsuit. In support of this position he cites *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Pittsburg etc. R. R. Co. v. Andrews*, 39 Md. 329; 17 Am. Rep. 568; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336; *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; *Dun v. Seaboard etc. R. R. Co.*, 78 Va. 645; 49 Am. Rep. 388; *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 1; 96 Am. Dec. 320. It will be best to ascertain the facts upon which the law is predicated in these cases, to understand the reason of it and the principle applied. In *Pittsburg etc. R. R.*

Co. v. McClurg, 56 Pa. St. 294, the plaintiff was injured "while a passenger in the cars of the defendant, by reason of the protrusion of his elbow beyond the sill of the car-window next to which he sat during the journey, or part of it, coming in contact with a car standing on a switch on the defendant's road." In *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49, the court say that "the only error in the instructions of the court related to that part of the case which involved an inquiry into the position of the plaintiff's arm at the time of the accident. If he was then riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him from maintaining his action." In *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 83, "the evidence showed," says the court, "that the injury received was a broken arm, and that at the time of the accident the plaintiff's arm was projecting out of the window of the coach in which he rode, in consequence of which it came in contact with some object outside, probably a timber frame supporting a water-tank." In *Pittsburg etc. R. R. Co. v. Andrews*, 39 Md. 342, the court say: "It is admitted his arm at the time was out of the window," and that "it is perfectly clear he would have received no injury if his arm had not been in this position." Without further reference, it is enough to say that the plain result of these cases is, that if a passenger is riding in a car, with his elbow or arm projecting out of the window, by reason of which he sustained an injury, it is such a clear act of contributory negligence on his part as will prevent a recovery, and make it the duty of the court to so declare, as a matter of law, notwithstanding the negligence of the defendant in permitting obstacles to be placed too near the track of the passing train.

But why is it contributory negligence, within the reason of these cases? The answer is, because, in projecting his elbow or arm out of the window, he was bound to know, as a reasonable man, in the exercise of ordinary care and foresight, that there was liability to injury from the exposed condition of the arm coming in contact with some external obstacle or force. He ought to know, to expose his arm or elbow under the surrounding circumstances, that it was dangerous, and liable to result in injury to it, because a prudent man might well foresee the possibility of such an occurrence; and if he do not avoid it by the exercise of such reasonable foresight, he may justly be held to have taken upon himself the risk of such

a peril. It is therefore considered in these cases to be a want of ordinary care for a passenger riding in a car to protrude his arm or elbow out of the window, and if he does, and is injured by reason thereof, it results, as a consequence, that his own want of ordinary care has contributed directly to produce such injury as the proximate cause thereof. But how is this to apply to the facts in the case at bar? It was not the elbow of the plaintiff, or any part of his arm, that was exposed to injury from outside obstacles, that caused the injury. His elbow, or the part of the arm outside of the window, was not hit. The stick of wood struck the palm of his hand, or so near it as to catch in the mouth of his coat-sleeve, which was inside of the window, and not exposed to external objects, unless they came inside of the window, as the evidence here shows. The cases referred to and relied upon by counsel proceed upon the hypothesis that the injury occurred because the elbow or arm which was exposed out of the window came in contact with some external obstacle or force and produced the injury. In the strongest of these cases, *Pittsburg etc. R. R. Co. v. McClurg*, and often cited, Thompson, C. J., said: "If he allow it [arm] to protrude out, and is injured, is this due care?" which Bigelow, C. J., had previously answered in *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49, saying: "If he was riding in the car with his elbow or arm projecting out of the widow, by reason of which he sustained an injury, he was guilty of a want of due care." The due care here required to be exercised is, not to expose the arm out of the window, as there is liability that it may come in contact with outside obstacles. It is based on the idea that when an arm is thus exposed the injury which may result may be foreseen, and avoided by the exercise of ordinary circumspection. It has no reference to risks or injuries which, according to common experience, and in the exercise of reasonable care and foresight, could not have been anticipated, or their consequences avoided. "We are not to link together," said Agnew, J., "as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of one act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of an act, or was within the probable range of ordinary circum-

spection when engaged in the act": *Fairbanks v. Kerr*, 70 Pa. St. 86; 10 Am. Rep. 664. Sitting, as he was, with his arm resting on the window-sill, and his elbow projecting out, especially in view of the fact that a similar injury would have probably occurred whether the elbow was inside or outside of the window, was it within the range of ordinary circumspection and foresight to have anticipated, as likely to happen, the event which occurred, and produced his injury,—to have anticipated that a stick of wood should fall through the open window, and inside of it, and strike his palm, or so near it as to produce the injury admitted, in consequence of the act in which he was engaged? Under the circumstances of this case, are we authorized to say, as a matter of law, that by the exercise of ordinary care and prudence he could have foreseen that there was liability to injury in the way in which it occurred, as the consequence of his act?

Be it remembered that the injury did not arise because the elbow projected, but because the stick struck the palm or wrist inside of the window, where it had a right to be, and worked its injury, and the case, upon its facts, would seem to stand precisely as if the arm rested on the window-sill entirely within the car. The law is well established that this cannot be declared to be negligence *in se*. In *Farlow v. Kelly*, 108 U. S. 208, it was held that it was not contributory negligence for a passenger to rest his arm upon the window-sill of a car in which he was riding, without allowing it to project. Such an act creates no presumption of negligence, and cannot be declared negligence in law: *Breen v. New York etc. R. R. Co.*, 109 N. Y. 297; 4 Am. St. Rep. 450; *Winters v. Hannibal etc. R. R. Co.*, 39 Mo. 470. The inception of the injury being inside of the window, it was not caused by any exposure of the arm outside of it, and can we say, logically or judicially, that the act of the defendant contributed to produce it? It would seem, as to the facts upon which that injury was predicated, that he stood without fault; for although the plaintiff may have been negligent in allowing his elbow slightly to extend outside of the window, yet if that did not cause the injury, and the result was the same as though he exercised the care required, and kept his arm inside, then such want of care, as was said in *Walker v. Westfield*, 39 Vt. 246, did not contribute to produce such injury, and it is the same as though he was without fault.

As the injury occurred, then, the plaintiff was under no

egal obligation to assume or anticipate that sticks or a stick of falling cord-wood would be projected inside of the window, and cause the accident where it happened. To have his hand and wrist where they were, and where the stick struck them, was where they had a right lawfully to be, and raised no presumption of negligence in law. If such is the case, however strict the rule of contributory negligence may be enforced, can we declare that the negligence of the plaintiff was the proximate cause of the injury? or in other words, that his want of ordinary care contributed directly to the injury? It is enough to say, when the arm is exposed, and the injury occurred on that account, when the facts are admitted, that it is negligence in law. Negligence is generally a question of fact, to be decided by the jury upon all the facts and circumstances, and the court ought not to declare it as a matter of law, unless there is such a plain act of carelessness upon the part of the plaintiff contributing to his injury as makes that a duty. The rule, as it is established by the weight of authority, has not always met with entire approval, and is sufficiently strict and arbitrary, without extending the domain of its operations. In *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758, the opposite view is ably and forcibly presented by a vigor and fitness of reasoning which it is difficult to answer. The truth is, that it is an every-day occurrence for passengers to ride with their elbow on the sill, slightly extending out of the window, though not, perhaps, outside of the sill. We all know in warm weather, when the windows are up, it is the constant and ordinary habit of passengers of all classes and all degrees of intelligence to so ride; and, judged in the light of our general knowledge and experience, it would be difficult to condemn such conduct as an act so plainly and palpably careless as to require the court to declare it negligence as a matter of law. If the rule is to obtain as decided by the weight of authority, let it continue to be confined in its operations to injuries which result from exposing the arm to outside obstacles, but let it not be extended to those where the facts are complicated, and the injury, although the elbow was slightly out of the window, did not arise from that fact, or if it had been inside, the arm otherwise preserving its relative position, a like injury would probably have happened. In cases of the first sort, it may be conceded, when the facts stand confessed or admitted, that the court may declare the act negligence as a matter of law; *non constat* that it can upon

the facts here. In cases of this sort, where the facts are complicated and debatable, where men of ordinary discretion and prudence might differ as to the inferences to be drawn from them in determining the character of the act, it is safer and better to submit them to the jury, in connection with all its attendant circumstances, whom the law assumes to be best qualified to dispose of them, under proper instructions from the court, than that the court itself should decide them, as a question of law, by allowing a nonsuit. Before the court can do this, and cut off the plaintiff's right to submit his case to the jury, the inferences from the proof ought to be certain and incontrovertible, freeing the mind from all doubt or hesitation; for it must always be borne in mind that it is generally for the jury to determine whether the defendant was negligent, or the plaintiff was contributorily negligent, which, as Dr. Wharton has aptly said, is seldom the "subject of direct proof, but an inference from facts put in evidence."

The judgment must be reversed, and the nonsuit set aside.

NEGLIGENCE IS ORDINARILY A QUESTION OF FACT for the jury to determine; and the court cannot properly pronounce certain facts to constitute negligence, unless no other inference may be fairly drawn from the testimony: *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note.

CARRIERS — NEGLIGENCE OF PASSENGER — RIDING WITH ARM OUT OF CAR-WINDOW. — Generally, one riding in a railroad car with his arm or elbow out of the car-window is guilty of contributory negligence, and cannot recover for injuries sustained thereby: *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49, and note. But see *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487; 84 Am. Dec. 758; *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 1; 96 Am. Dec. 320, and note.

CORT v. LASSARD AND LUCIFER.

[18 OREGON, 221.]

CONTRACT — INJUNCTION AGAINST BREACH OF BY ACROBATS. — Where services contracted for are unique and extraordinary, involving such special merit or qualifications as to make them distinctly personal and peculiar, so that in case of default the same or like services could not be easily procured nor compensated in damages, an injunction will issue to prevent a breach of the contract, although it contains no negative stipulation. But if such services are ordinary and without special merit, and such as can be readily supplied or obtained without difficulty or expense, the court will not interfere by injunction to prevent a breach of the contract. Injunction will not issue to prevent acrobats from violating their

contract with a theatrical manager, by performing at a rival theater, if their performances are not unique or unusual in character, but are those of ordinary acrobats or tumblers.

Sears and Beach, for the appellant.

C. H. Hewitt, for the respondents.

LORD, J. This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place. The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract, whereby it was agreed that the defendants were to perform as acrobats, exclusively for the plaintiff, during a period of six weeks, at a salary of sixty dollars per week, etc.; that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performance of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc., that the said defendants are entirely impecunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply. Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of a unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: 1. That it is

immaterial whether the performance is unique, or involves special knowledge or skill; and 2. That the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a prerequisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provided that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the legal remedy. In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part: *Kemble v. Kean*, 6 Sim. 333. But this case was expressly overruled in *Lumley v. Wagner*, 1 De Gex, M. & G. 604, upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the lord chancellor said: "The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound

construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would with reference to the contract into which she has actually entered." In *Montague v. Flockton*, L. R. 16 Eq. 189, it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. Referring to *Lumley v. Wagner*, 1 De Gex, M. & G. 604, the vice-chancellor said: "It happened that the contract did contain a negative stipulation, and finding it there, Lord St. Leonard relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and granted the injunction on the grounds that Mdlle. Wagner, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point." As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses. Until *Daly v. Smith*, 49 How. Pr. 150, was decided, the doctrine of *Lumley v. Wagner*, 1 De Gex, M. & G. 604, was either entirely rejected or only partially accepted: *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 528; *Fredericks v. Mayer*, 13 How. Pr. 566; *Builer v. Galletti*, 21 How. Pr. 465; *Burton v. Marshall*, 4 Gill, 487; *Hayes v. Willio*, 11 Abb Pr., N. S., 167. In that case (*Daly*

v. Smith, 49 How. Pr. 150), the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with *Lumley v. Wagner*, 1 De Gex, M. & G. 604. See also *Hala v. Concordia Society*, 42 Md. 465; *McCaull v. Braham*, 16 Fed. Rep. 37. In *Fredericks v. Mayer*, 13 How. Pr. 567, and *Butler v. Galletti*, 21 How. Pr. 466, the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, whose performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained; for the fact is, that such actors do often possess special merit of extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar, and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places, or in obtaining from others the same service, as would happen with actors, whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the application of the preventive remedy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined. Such a stipulation existed in the contract in *Daly v. Smith*, 49 How. Pr. 150, upon which relief was granted, although the opinion is broad enough to include contracts without such stipulations, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time of necessity

involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So that, according to all the authorities, where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and in case of default the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is, that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages. "Where," says Professor Pomeroy, "a contract stipulates for a special, unique, or extraordinary personal service or acts, or for such services or acts to be rendered or done by a person having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." Pomeroy's Eq. Jur., sec. 1343. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market, as in case of an ordinary contract of employment between an artisan, a laborer, or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly personal and peculiar, so that in case of a default by them the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction and granting relief; but otherwise, or denied, if such

services were ordinary, and without special merit, and such as could be readily supplied or obtained from others without much difficulty or expense. But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique or of any special merit. The plaintiff himself will not even admit that they are; while others say the performances were "great," "pretty good," "do a fair act," etc.; and others, that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

CONTRACTS BETWEEN ACTORS AND THEATRICAL MANAGERS, their effect and enforcement: Note to *McCrea v. Marsh*, 71 Am. Dec. 750, 751.

FARQUAR v. CITY OF ROSEBURG.

[18 OREGON, 271.]

MUNICIPAL CORPORATIONS — LIABILITY FOR DEFECTS IN STREETS. — When a city by its charter is under obligation to keep the streets and highways within its limits in repair, and in a safe and convenient condition for travel, it is liable in damages to one who is injured by reason of its neglect of such duty.

L. F. Mosher and C. A. Sehlbrede, for the appellant.

Lane and Lane, and Hamilton and Hamilton, for the respondent.

LORD, J. This was an action to recover damages for injuries sustained by the plaintiff on account of an excavation which the defendant suffered to remain open without proper protection, etc., and of which it had timely notice, etc. The answer denied all the allegations of the complaint, and alleged separately: "That whatever injuries plaintiff sustained at said time, if any, were caused by the negligence and carelessness and fault of the plaintiff himself, in carelessly and negligently driving down the bank of the South Umpqua River, situate in

Douglas County, Oregon." The reply put in issue this, and alleged that the injuries complained of occurred, as alleged, within the corporate limits of said city, and at a point where Oak Street approaches the South Umpqua River. Upon a trial by jury a verdict was rendered in favor of the defendant, and upon which a judgment was rendered, from which this appeal has been taken. The error alleged was in the refusal of the trial court to give a certain instruction asked by the plaintiff, to which we shall presently refer.

The bill of exceptions makes the following statements of facts: "The plaintiff, to sustain the allegation on his part, gave evidence on his own behalf, tending to prove that on the ninth day of July, 1888, the plaintiff was injured by being precipitated into a deep and dangerous excavation in Oak Street, within the corporate limits of the city of Roseburg, in Douglas County, Oregon; that he sustained injuries thereby, and was damaged in the sum of one thousand dollars; that by the negligence of said defendant, said excavation was allowed to remain open and unguarded, and that the said city had notice of the dangerous condition of said street, and that through the carelessness of said defendant, in so allowing said street to remain in said dangerous condition, the plaintiff was so precipitated into said excavation and injured as aforesaid." There was evidence, also, of other witnesses tending to show the dangerous condition of said street, as well as that the accident did occur, and that the plaintiff was severely injured by reason of said defect, and that the defendant had notice of the same. The defendant, in order to defeat the claim of plaintiff, introduced evidence tending to show that no dangerous defect existed; that the place where said accident occurred was not in any street of the city, but in a county road, or open way, in said city, connecting with and forming an extension to said Oak Street.

And now comes the instruction asked for, and which the court refused: "If this locality was a public highway at the date of the charter of the city, the acceptance of the charter imposed upon the city the duty and obligations which would arise from any street dedicated the city, so far as to keep it in repair." It is not disputed but that the place where the injury occurred, whether it be a street or highway, was within the corporate limits of the city; but the contention is, that a different duty prevails, as it may be considered one or the other. That might be true in some cases, but the record before us

does not present that state of facts which makes the distinction. It was argued that the portion of the highway where the accident happened had been vacated, but if this was so it was a matter of defense, and is outside of the record. There was evidence, however, tending to show that the place alleged was not in any street of the city, but a county road, or open way, in said city, connecting with and forming an extension of Oak Street. But this would make no difference in the liability or duty to keep it in repair if the act of incorporation devolved that duty upon the city, for, as the court said in *Paine v. Brockton*, 138 Mass. 568: "But if one public way enters into another, it is the duty of a city or town to keep the entrances in repair, so that they may be safe and convenient for travelers, because the entrances are a portion of the public way used by travelers." Here the instruction asked does not touch all the duties and obligations which might arise in respect to dedicated streets, but confines it simply to the duty of repair; and in this particular the claim is, that it is the duty of the city, whether it be a street or highway within the corporate limits over which it has jurisdiction, to keep it in repair, in order that it may be safe and convenient for travel.

The charter of the city provides, among other things, that said city shall have power to grade, macadamize, plank, or otherwise improve and keep in repair streets, highways, alleys, cross-walks, etc. The omission of duty alleged was the failure to keep the street or highway in repair, and in this regard the duty imposed by the charter does not differ as to streets or highways, but is the same. And if the locality was a public highway when it was included within the corporate limits, although it may have retained its character as a highway, yet it became the duty of the city to keep it in repair, so that it might be safe and convenient for travel. Where the care and superintendence of streets, alleys, and highways, the regulation of grades, the opening and vacation of streets, devolve upon a municipality, liability follows a neglect of duty to keep them in repair.

By many authorities these things are said to be peculiarly municipal duties, and especially is this so when included in the corporate limits, and the duty imposed by charter; for what other power could more judiciously control the matter than the municipality of the immediate locality where the work is to be done? It is elementary law that one who is traveling along a highway, and is injured, either in his per-

son or his property, as the result of defects in the highway, can recover all the damage suffered by him from the municipality whose duty it was to keep the highway in repair, and who has neglected to that duty. The charter imposes this duty upon the city, alike upon streets or highways within its limits, and consequently, upon the case presented by this record, it was the duty of the city to keep the highway where the accident occurred in repair, and safe and convenient for travel. It was argued that there was nothing to show that the city had ever accepted the highway, but it was a sufficient acceptance of the same to include it with the corporate limits of the city: *City of Goshen v. Myers*, 119 Ind. 200. At least that is the result to which we must come when the highway is within the corporate limits, and the charter provides to keep it in repair, in order that such highway may be reasonably safe for travel.

As the case stands, we think it was error to refuse the instruction, and the judgment must be reversed, and a new trial ordered.

THE CASE of *McAllister v. City of Albany*, 18 Or. 426, was an action brought to recover damages for injuries sustained by plaintiff by reason of his having driven his team into a ditch across a certain street of the city. This ditch was dug in the construction of a sewer, and was left open without lights or guards. The main defense relied upon by the city was, that the act which caused the injury was occasioned by one Walter East, to whom the city had let the contract for the construction of the sewer, and that, under the terms of his contract, he was an independent contractor, with the exclusive control of digging the ditch and of the laborers engaged thereon, and that for this reason plaintiff ought not to be allowed to maintain his action against the city. The court, in speaking of the principles of law applicable to such a state of facts, said: "No rule of law is better settled than that one who contracts with another for the performance of certain work is not liable for injuries produced to third persons by the negligence of the latter in the performance of that work, when the relation of master and servant does not exist. Whether the rule applies to a municipal corporation, owing a duty to the public to keep its streets safe for travel, is a question which has been much discussed, and upon which there is some diversity of judicial opinion. To the general rule as stated, the cases indicate that there are two exceptions: 1. Where the work is intrinsically dangerous to the public, however skillfully performed, and the injury results directly from the work, in which case the liability cannot be avoided by contract, either by individuals or municipalities; and 2. Where the law devolves the duty upon a municipal corporation to keep its streets in a safe condition for travel; in such case the authorities are not agreed, but, in the later and better-considered cases, hold that the municipality is liable to persons for injuries arising from neglect to keep proper lights and guards around a ditch or excavation which it has caused to be made in the streets, and that such liability

cannot be evaded by contract." Determining the first exception, the court quoted from 2 Dillon on Municipal Corporations, 4th ed., sections 1023, 1029, as follows: "The principle of *respondent superior* does not extend to cases of independent contracts, where the party for whom the work is to be done is not the immediate superior of those guilty of the wrongful act, and has no choice in the selection of workmen, and no control over the manner of doing the work under the contract. . . . It is important to bear in mind that it does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such case, the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." The court then stated that the case fell under the second exception, and, in effect, that the charter of the defendant city not only imposed the duty of keeping its streets in a safe condition for travel, but conferred the necessary powers to carry out the object for which the duty was imposed; and that "it would seem from the intrinsic nature of the duty confided to the city that it could not delegate it to another, by contract or otherwise, so as to escape liability for negligence"; again quoting from 2 Dillon on Municipal Corporations, 4th ed., section 1027, that "according to the better view, where a dangerous excavation is made, and negligently left open (without proper lights, guards, or covering) in a traveled street or sidewalk, by a contractor under the corporation for building a sewer or other improvement, the corporation is liable to a person injured thereby, although it may have had no immediate control over the workmen, and had even stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and making him liable for accidents occasioned by his neglect."

Storrs v. City of Utica, 17 N. Y. 104, 72 Am. Dec. 437, is cited as a leading case. There the action was against a city for negligence in allowing an excavation in the street, made in the construction of a sewer, to remain open at night without proper lights and guards; and the court decided that a city, owing to the public the duty of keeping its streets in a safe condition for travel, was liable to persons who received injury from a neglect to keep proper lights and guards at night around such an excavation, whether it had or had not contracted for such precautions with the person constructing the sewer. In that case Judge Comstock said: "The principles suggested become plain propositions in the case of a municipal corporation, which owes to the public the duty of keeping its streets in a safe condition for travel. Although the work may be let out by contract, the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very probably be bound by his agreement, not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way either avoid indictment in behalf of the public or its liability to individuals who are injured." While the court admitted that the cases of *Barry v. City of St. Louis*, 17 Mo. 121, and *Painter v. Mayor etc. of Pittsburg*, 46 Pa. St. 213, cited by the defendant, support its position, still it thought that the weight

of authority, as well as reason and public policy, was against it, and cited *Storrs v. City of Utica*, 17 N. Y. 104; 72 Am. Dec. 441, and note; *Robbins v. City of Chicago*, 4 Wall. 667; *St. Paul Water Co. v. Ware*, 16 Wall. 566; *City of St. Paul v. Seitz*, 3 Minn. 297; 74 Am. Dec. 753; *Mayor etc. of Birmingham v. McCary*, 84 Ala. 469; *Mayor etc. of Baltimore v. O'Donnell*, 53 Md. 110; 36 Am. Rep. 395; *City of Logansport v. Dick*, 70 Ind. 65; *City of Detroit v. Corey*, 9 Mich. 165; *Circleville v. Neuding*, 41 Ohio St. 465; *City of Springfield v. Le Claire*, 49 Ill. 476; *City of Nashville v. Brown*, 9 Heisk. 1; *Wilson v. Wheeling*, 19 W. Va. 323; 2 Dillon on Municipal Corporations, 4th ed., secs. 1027, 1029, 1030. The court then referred to the fact that the ditch dug across the street for the purpose of constructing the sewer was dug by the contractor under express authority from the city; and while it could contract with him to do the work and authorize him to excavate for that purpose, still it was under obligation to keep the street in a reasonably safe condition for travel. Leaving the ditch uncovered at night, and not properly lighted or guarded, involved great peril to persons traveling the street. The public may assume that a duty which the law imposes is performed, and that the street is in a safe condition for travel when notice by lights or safeguards are not put around excavations. This duty on the part of the city cannot be evaded by contract, and when an independent contractor, in the prosecution of the work, leaves the street in an unsafe and unguarded condition for travel by night, whereby an injury is sustained by a traveler, the city is liable, notwithstanding the stipulations in the contract in respect to this matter. It is very proper in a city to stipulate with its contractor that in the prosecution of his work he shall take all necessary precautions against accidents by leaving the streets in an unsafe and unguarded condition, yet this will not excuse the city for negligence in failing to observe these precautions, in the absence of want of ordinary care in the party injured. The city must see that its duty to keep its streets in a reasonably safe condition is fully performed, to avoid liability.

KILLINGSWORTH v. PORTLAND TRUST COMPANY.

[18 OREGON, 251.]

CORPORATION — DEED BY, AS ATTORNEY IN FACT.— A corporation may execute a valid deed of conveyance of real property as the attorney in fact of another, in the absence of statutory or charter provisions to the contrary.

CORPORATIONS — POWER OF, TO CONVEY BY DEED AS AGENT.— A corporation has a right to conduct its legitimate business by all means necessary to effect its object, and, within its prescribed range, can do whatever a natural person could do. In the absence of charter or statutory provision forbidding, it may act as the agent, either for an individual, partnership, or another corporation, by power of attorney, to sell and convey real property, and performance of its engagements through its agents does not involve a delegation of powers.

LORD, J. This is an action to recover damages for failure of the defendant to execute and deliver to the plaintiff a conveyance of certain premises, pursuant to an agreement to that

effect. The defendant denies this, and alleges, as the attorney in fact of one Deborah H. Ingersoll in compliance with said agreement, that it did execute and tender to the plaintiff a conveyance of said premises, etc., and now brings it into court and deposits it for the plaintiff, and that plaintiff refuses to accept the same. To this the plaintiff demurred, on the ground that the same does not state facts sufficient to constitute a cause of defense to the cause of action alleged. The point raised by the demurrer is, Can the defendant, a corporation, execute a deed of conveyance of real property as the attorney in fact of another? In this state, the right to become incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Corporations which owe their existence to the common law must be governed by it in the mode of their organization, in the manner of exercising their powers, and in the use of the capacities conferred. But the legislature may authorize the creation of corporations for many purposes not contemplated by the common law, and endue it with powers and capacities to be exercised in disregard of its rules, or which may greatly extend, modify, or limit its common-law powers and privileges. The measure of the legislative power in this regard is limited only by circumstantial provisions. Ordinarily, in the creation of corporations, the common-law incidents and powers are implied, unless otherwise provided or restrained by the law of its corporate existence. But in determining the nature and extent of the powers and capacities conferred on a corporation, and the mode of their exercise, the law of its creation, whether a charter or a statute, must be consulted; for it has no power except as thus given, either expressly or as incidental to the exercise of the powers granted.

It is provided by our statute that a corporation may engage in any lawful enterprise, business, pursuit, or occupation (Code, sec. 3217), so that, unless corporations are affected with some disability, when the articles of incorporation are sufficient for the purpose, there is no lawful occupation or business in which it may not engage in this state exactly as individuals. By its articles of incorporation, the defendant corporation is expressly authorized and empowered "to act as the general or special agent, or attorney in fact, for any public or private corporation, or person, in the management and control of real estate or other property, its purchase, sale, or conveyance, etc." No question is made but what the defend-

ant, by its articles of incorporation, has conferred upon it the power to do the act for which there is claimed to be an alleged failure; but the contention is, that a corporation, from the nature of the organization as an artificial body, necessitated to act through agents, is incapable of executing a deed as an attorney in fact. This argument is based on the assumption that there are some things, from the inherent nature of the case, that a corporation is incapable of doing, and seeks its illustrations in the common law, as that a corporation cannot be an administrator or executor, because its duties are of a personal nature and cannot be delegated, or to take an oath, when so required by law, before proceeding to execute some duty or trust. But this argument overlooks the fact that a corporation may be empowered to do by statute what it was incapable of doing under its common-law powers, and when thus created, its powers, capacities, and modes of exercising them depend upon the statute. Nor is the disability in such cases of a character which cannot be obviated by statute, for, as Mr. Morawetz says, there are numerous instances in which corporations have been expressly empowered by statutes to administer estates: Morawetz on Corporations, sec. 357.

The reason why a corporation was unable to perform the office of executor or administrator, as stated by Blackstone, was, that it could not take an oath for the due execution of the office: 1 Bla. Com. 477. But to enable a corporation to act as executor or administrator, the statute may dispense with the oath, or provide that some one of its officers may take it, or the law of the state may not require any oath for the due execution of the office, and in such case, when no other impediment intervenes, a corporation may act as administrator, when the law of the state does not require the administrator to take an oath. It was not so held in *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 156. So, too, in *Lincoln's Sav. Bank v. Ewing*, 12 Lea, 602, where it was urged that a corporation was incapable of taking to itself a mortgage or trust conveyance, it was held that a corporation may take and hold as a trustee or mortgagee, and execute a trust in which it has an interest within the scope of its business, and a failure or inability to comply with the provisions of the code, by taking the required oath, would not affect the validity of the deed or the title vested. As it is not questioned that the business in which the defendant is engaged is a lawful occupation, and that the articles of incor-

poration are sufficient to confer the power on the defendant to act as an attorney in fact in furtherance of its legitimate objects, there is nothing to prevent it from doing the acts essential to carry on its business and comply with the terms of its agreement, unless it is incapable of performing such acts from some cause inherent in itself. A corporation, like a natural person, has a right to conduct its legitimate business by all the means necessary to effect such object. Within its prescribed range it can do whatever a natural person, *mutatis mutandis*, could do: Wharton on Agency, sec. 57. In *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 280, it is said: "Every corporation, as such, has the capacity to take and grant property and to contract obligations the same as an individual. . . . And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such objects, unless expressly prohibited by law." Having the power conferred upon it to act as an attorney in fact, is it not endowed with all the faculties or capacities essential to execute it and carry out the business projects of its creation? Why may not a corporation act as an agent for an individual or another corporation? As the owner of real property, it can, by its authorized agents, execute a conveyance, or it may authorize another, by power of attorney in writing, to convey such property for it. Why, then, may it not act as the agent or attorney in fact of another for a like purpose, when it is so authorized, and to thus act is one of the chief powers conferred to effect the object of its creation and to carry on the business in which it is engaged?

"Within the scope of its corporate powers," says Mr. Mechem, "unless there are express provisions in its charter, or constating instruments to the contrary, a corporation may act as agent, either for an individual, a partnership, or another corporation. Many of the great corporations of the country are organized for this express purpose under statute or charters conferring and defining their powers and the methods of executing them; but even in other cases the authority so to act might be implied as auxiliary to their main purpose": Mechem on Agency, sec. 64. It is clear, then, that a corporation may act as the agent of another, and if so, it must be endowed with the faculties or instrumentalities to perform the office it is authorized to undertake and carry out the purposes of its creation. When a corporation engages in a legitimate

business, and is authorized by its incorporation to do the things necessary to carry on such business, it is an express grant of power to enable it to effect that object. If it is to be excluded from doing such things because, from the nature of its organization, it cannot act personally, but only through agents, there would be little left in the domain of business it could do. As was said by the court in *Hopkins v. Gallatons Turnpike Co.*, 4 Hump. 412: "The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, cannot in the nature of things be applied to corporations aggregate, these being of mere legal existence, and their board, as such, literally speaking, are incapable of a personal act. They direct or assent by vote, but their most immediate mode of action must be by agent." Being a creation of the law, — an artificial person, — it can only act by agents, who are its limbs or instrumentalities, to effect the purpose for which it was organized, and to act for it, their act being the act of the corporation, exactly as the act of an individual is his act. As such, upon the principle of the objection raised, it could not make an acknowledgment in person, but it may by its officers, and in such cases, its officer affixing the seal is the party executing the deed within the meaning of the statute requiring deeds to be acknowledged by the grantor: *Kelly v. Calhoun*, 95 U. S. 711; *Frostburg M. B. Ass'n v. Brace*, 51 Md. 508; Am. & Eng. Ency. of Law, tits. Acknowledgments, Corporations.

In fact, within the same principle of reasoning, it may be said that a corporation cannot make a deed of its own property; but we know it can, and that the act of its officers in so doing is the act of the corporation. When a corporation is made the agent of another to sell and convey property, it acts through the same instrumentalities as when acting for itself, and the relation between it and its instrumentalities are as one being, or artificial person, in the performance of its engagement, and involves no delegation of powers. So that when a corporation is invested with a power of attorney to sell and convey real property, the person conferring the power knows that the corporation cannot act personally in the matter, but that in performing the engagement it will act through its agents, who for that purpose are its faculties, and whose acts in the discharge of that duty are the acts of the corporation, and, as such, must be considered to be included in the artificial person as instrumentalities authorized by him to do

the act conferred upon it by his power of attorney. In this view, the argument that the corporation cannot do such act under the power of attorney without a delegation of authority to its agents, and that the grantor of the power has given no such power of substitution, cannot be sustained.

There was no error, and the judgment must be affirmed.

CORPORATIONS MAY BE THE AGENTS OF INDIVIDUALS: *McWilliams v. Detroit etc. Co.*, 31 Mich. 275. Corporations within the scope of their authority have the same powers as individuals: *Deringer's Adm'r v. Deringer's Adm'r*, 5 Houst. 416; 1 Am. St. Rep. 150.

SMALLMAN v. POWELL.

[18 OREGON, 867.]

ESTATES OF DECEDENTS — DESCENT — NEXT OF KIN. — A grandfather is one degree nearer of kin than an uncle, under the civil law. Therefore, where kindred is to be computed under that law, a grandfather will, as next of kin, take the estate of an intestate who dies without issue, wife, nor father, mother, brother, nor sister, in preference to an uncle.

CONTEST to determine whether plaintiff as uncle, or defendant as grandfather, of Sampson T. Powell, is entitled to inherit, as next of kin, the land of which he died possessed, and intestate, without wife, father, mother, sister, brother, nor issue.

J. K. Weatherford, for the appellant.

J. C. Powell, for the respondent.

LORD, J. This case presents the single question, whether the real property already described passes to the defendant as next of kin, the former being the grandfather and the latter the uncle of the intestate. The whole matter depends upon the meaning to be given to subdivision 5 of section 3098 of the Oregon Code: "If the intestate shall leave no lineal descendants, neither wife, nor father, mother, brother, nor sister, such real property shall descend to his next of kin in equal degree," etc. And section 3103 provides that "the degree of kindred shall be computed according to the rules of the civil law." It is somewhat difficult to catch the point in the contention for the plaintiff. While the rule for computing kindred, as declared by the statute, is admitted, the argument indicates that if so computed, and the grandfather be found to be one degree nearer than the uncle, he would not be entitled to the inheritance, because he is not of the blood of the

ancestor from whom the estate originally descended. The argument proceeds upon the theory that there is an exception when the estate comes by descent, which, by the law of some of the states, when the intestate leaves no children, reverts to the heir or kindred of the person through whom it is acquired. The policy of the common law was to keep the real property in the line of the ancestor by whom it was brought into the family, and the statutes of descent, in some of the states, in certain cases, have provisions to that effect. But generally, in the United States, the English common law of descents, in its essential features, has been rejected, and each state has established a law for itself: 4 Kent's Com. 412. In fact, by enactment, the common-law rule prevails, that the right of succession is entirely statutory.

The reason is obvious. At common law, the canons of descent grew out of the feudal system of tenures, and the policy of the state to establish and maintain a wealthy landed aristocracy, which co-operated to prevent the distribution of real property, and to promote its accumulation in the hands of the few. An important factor in working out this result was the common-law mode of computing kindred, which, being alien in spirit to our political institutions, has been generally rejected, and in this state abrogated and the rules of the civil law adopted. In the mode of computing degrees of kindred, the civil law did not begin as at common law, and reckon from the common ancestor downwards to each of the persons related, or to the most remote of them, but from the person *a quo* upwards to the common stock, and then downwards to the other party related. "The difference is manifest; the canon and common law starting from the common ancestor, and the civil law starting from the intestate himself, as the *terminus a quo*, the several degrees are numbered. Thus by the civil law, from the intestate to his father, in lineal ascent, is one degree, and thence to the grandfather, is another, or the second, degree. Again, from the intestate to his mother is, lineally, one degree; thence to her father or mother is the second degree, and thence downward to the aunt is the third degree. The paternal grandfather being in the second and the maternal aunt in the third degree by this mode of computation, he is therefore the nearest of kin. The spiritual courts have adopted the rule of the civilian in reckoning propinquity of degree, and in so doing have necessarily placed grandfathers a degree nearer the intestate than uncles and aunts":

Sweezy v. Willis, 1 Bradf. 498; 2 Bla. Com. 224; 2 Kent's Com. 422.

Under the civil law, then, the grandparents are one degree nearer than uncles and aunts, and so speak all the authorities without a dissentient voice: *Cables v. Prescott*, 67 Me. 582; *Kelsey v. Hardy*, 20 N. H. 479; *Ryan v. Andrews*, 21 Mich. 229; *Phillips v. Petest*, 35 Ala. 696; *Barger v. Hobbs*, 67 Ill. 592; *Cramer's Appeal*, 43 Wis. 167; *Bassil v. Loffer*, 38 Iowa, 451; *Cole v. Bailey*, 2 Curt. 562; 2 Domat's Civil Law, sec. 2832, 2834. Peter Powell, therefore, as the grandfather of the intestate, Sampson T. Powell, is one degree nearer than John Smallman, his uncle, the plaintiff, and his next of kin, upon the facts, to which the estate ascends, unless there is some exception which affects that result.

A glance at the statute will satisfy any one that, in the absence of those specified, the estate goes to the next of kin, as computed by the civil law. The course is prescribed by the statute without reference to the source from which the property was acquired. While it may be admitted that whenever a statute does not prescribe in a given case to whom an estate shall descend, that the common-law rule prevails for ascertaining who is the person or heir entitled to take. No such inquiry can arise here; for the statute provides, in direct terms, that "if the intestate shall leave no lineal descendants, neither wife, nor father, mother, brother, nor sister, such real property shall descend to his next of kin in equal degree." And as Sampson T. Powell, the intestate, had no issue, nor wife, nor father, mother, brother, nor sister, his grandfather, the defendant, would take the estate in preference to the plaintiff, his uncle. The statute makes no distinction founded upon the source from which the property has been derived, but assigns it to the next of kin, who is the defendant and grandfather, upon the facts, as reckoned by the civil law, and to whom it must ascend.

It follows there was no error, and that the judgment of the court below must be affirmed.

DESCENT — GRANDPARENTS — UNCLER. — As next of kin, grandparents are nearer than uncles or aunts, and great-grandparents than great-uncles or great-aunts: Note to *In re Ingram*, 12 Am. St. Rep. 108, 109.

JEWETT v. OLSEN.

[18 OREGON, 412.]

COMMON CARRIER — LIABILITY FOR GOODS SEIZED UNDER ATTACHMENT. —

When goods in the hands of a common carrier for transportation and while in transit are seized, under process sued out against the owner, and taken out of the carrier's possession, the property is thus placed in the custody of the law so as to excuse the carrier from liability for non-delivery.

COMMON CARRIER — DUTY AS TO GOODS ATTACHED IN HIS CUSTODY. —

When goods in transit are taken from the possession of the carrier, under attachment against the owner, it is the carrier's duty to immediately notify him of the fact.

X. N. Steeves, for the appellant.

T. B. Handley, for the respondent.

LORD, J. The facts are, that on the eighteenth day of November, 1887, one Northrob delivered at Tillamook, Oregon, a lot of apples to William Olsen, to be carried on the steamer Rosa Olsen, and delivered at Portland. The apples were not marked in any way, nor consigned to any one. On the twenty-first day of November, 1887, at Astoria, the constable came on board of the steamer with writs of attachment, and by virtue of the same levied upon the apples, and took them off the steamer and sold them. These actions were against Northrob, and were for the purchase price of said apples, and judgment was rendered in them on February 13, 1888. When the apples were seized under the writs of attachment, Northrob was at once notified, but remained passive and made no defense. On the thirteenth day of February, 1888, the said Northrob sold said apples to one Jewett, who since has brought the present action against Olsen for failure to deliver the apples, according to the contract of shipment made by Northrob with Olsen. It will be noted that the property, when delivered to the carrier, was not marked nor consigned to any one, but was to be delivered at Portland, and presumably to Northrob, or to whomsoever he should authorize to receive them, by assignment or otherwise; that while such property was *in transitu*, it was seized under writs of attachment at an intermediate port, and being perishable property, was sold, but that Northrob, who was then the owner of the apples, was immediately notified, in order that he might make his defense to the suits against him on which the property had been seized, and that he disregarded such notice, and refused or

failed to make any defense in the premises, but, two or three months subsequently, sold the property to the plaintiff in this action. As a separate defense to the action, the proceedings, etc., in the writs of attachment were set up, and upon demurrer were sustained, as stating facts sufficient to constitute a defense, and the demurrer overruled, but during the trial, when offered in evidence in support thereof, were excluded by the court, and now constitute one of the assignments of error upon this appeal. Upon the facts, the proceedings under which the goods were taken by the officer from the custody of the carrier were against Northrob, to whom the property belonged, and who subsequently sold them to the plaintiff in this action. It will be seen, then, that the question we are to decide is, whether a common carrier is excused from liability for not carrying and delivering the goods, when they are, without any fault or fraud on his part, seized by virtue of a legal process and taken out of his possession. "That this will excuse the carrier," says one author, "is now almost universally conceded by the courts, in the absence of connivance or collusion on the carrier's part, and it seems to make no difference by whom or against whom the process is sued out, if it be valid": Hatch on Carriers, sec. 396. "If this defense were not valid," says another learned author in a note, "it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do": 2 Redfield on Railways, 158.

In the supreme court of the United States, where goods in the hands of a carrier had been attached by a third party in a suit brought by the consignees on a bill of lading, Mr. Justice Nelson said: "After the seizure of the goods under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiff without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the attachment. It is true that these goods had been delivered to the defendants, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons, but this circumstance did not impair the legal effect of the seizure, or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the

sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiff. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 452, 290, and 850 of Drake on Attachment, 2d ed.: *Stites v. Davis*, 1 Black, 101; see also *The Idaho*, 93 U. S. 575. In *Ohio & M. R'y Co. v. Yohe*, 51 Ind. 184, 19 Am. Rep. 727, the objection was taken by demurrer, and sustained by the court, that the answer did not state facts sufficient to constitute a defense, but it was on the ground of the want of an averment that the defendant gave immediate notice to the plaintiffs that the goods had been seized and taken out of his possession, which is duly alleged in the answer herein.

In delivering the opinion of the court, Mr. Justice Downey said: "It is impossible for the carrier to deliver the goods to the consignee when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered him for carriage, to investigate the question of ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it is material what the form of process may be. In every case the carrier must yield to the authority of legal process. After seizure of the goods by the officer, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process, or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrongfully seized, the plaintiffs have their remedy against the officer who seized them, or against the party at whose instance it was done. As between the parties, the process would be no justification if the plaintiffs were the owners and entitled to the possession of the goods. The carrier is deprived of the possession of the goods by a superior power, the power of the state, — the *vis major* of the civil law, — and in all things as potent and overpowering, as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact, it

amounts to the same thing; the carrier is equally powerless in the grasp of either." In *Savannah etc. R. R. Co. v. Wilcox*, 48 Ga. 433, where goods were delivered to a common carrier for transportation, and were seized by legal process, and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply, and took no further notice of the proceedings, it was held that the carrier had a legal right to presume they had abandoned the property as subject to legal process, which had seized it. And further, that a seizure under the warrant of the goods while in the carrier's possession would be a good excuse for their non-delivery. In *United States Mail S. Co. v. Van Winkle*, 37 Barb. 122, a case where goods were seized on attachment, the court held: "If the goods are taken from a bailee or carrier by authority of law, or any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper for a non-delivery." In *Bliven v. Hudson Riv. R. R. Co.*, 36 N. Y. 403, it was held that a common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by legal process, and where the carrier immediately notifies him of such taking: *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *Edson v. Weston*, 7 Cow. 278.

Now, according to the facts, Northrob was the owner of the apples at the time they were seized under writs of attachment upon a debt or debts against him, and taken out of the possession of the defendant, and when he was notified of such attachment and seizure, and yet he disregarded the notice, and allowed the proceedings to go on without any defense thereto, and subsequently sold the property, and his claim thereto, to the plaintiff. At the time of the seizure, there was no consignee to whom the goods were delivered, nor were they marked, nor any other person known to the carrier, other than Northrob, upon whose debts the property was seized as owner, and whose subsequent conduct, in selling it, indicates that he was the recognized owner. When property is in the hands of a carrier for transportation, and in the course of transit is seized upon process sued out against the owner of the property, and taken out of the carrier's possession, such property is placed in the custody of the law, and is so placed by a superior power, — the power of the state, — and excuses the carrier from liability for a non-delivery.

It follows that the judgment must be reversed, and a new trial ordered.

CARRIERS—LIABILITY FOR GOODS SEIZED UNDER ATTACHMENT.—Seizure by a sheriff under regular process, of property in the hands of a carrier for shipment, relieves the carrier from liability for non-delivery: *Pingree v. Detroit etc. R. R. Co.*, 66 Mich. 143; 11 Am. St. Rep. 479, and note.

WALLACE v. SCOGGINS.

[18 OREGON, 502.]

STATUTE OF FRAUDS—ORAL LEASE FOR MORE THAN A YEAR—PART PERFORMANCE—SPECIFIC PERFORMANCE.—A parol agreement for a lease of lands for more than a year is void; but if the tenant has entered into possession, paid rent, incurred expenses in improvements, and changed his circumstances and condition, relying upon the oral agreement, to such an extent that a refusal on the part of the landlord to perform operates as a fraud on the tenant, there is such part performance as will take the case out of the statute of frauds, and authorize the court to decree specific performance of the parol agreement.

STATUTE OF FRAUDS—PAROL LEASE FOR MORE THAN A YEAR—SPECIFIC PERFORMANCE.—A parol agreement for a lease of lands for more than a year is such an agreement that its part performance takes it out of the operation of the statute of frauds, and renders it enforceable by decree of specific performance in equity.

A. H. Tanner, for the appellant.

Williams and Wood, for the respondent.

STRAHAN, J. This is a suit in equity whereby the plaintiff seeks the specific performance of a parol lease of certain premises situated in the city of Portland. In her complaint, the plaintiff, in substance, alleges that on or about July 1, 1888, the plaintiff rented from the defendant the property in the city of Portland known as No. 247 Alder Street, for the term of two years, at the rent of forty dollars per month; that about the time said lease was made, and in pursuance thereof, plaintiff entered into the possession of said premises; that she cut and fitted expensive carpets for the house, painted certain portions of the inside thereof, and expended a large sum of money in fitting up said house to be used as a residence during said two years; that she purchased and placed in the cellar of said house a large quantity of coal and wood for her winter's supply; and that she regularly paid the rent at the end of each month, and has fully performed the contract of

lease on her part; but that the said defendant, under the pretense that said lease was not in writing, commenced a suit against this plaintiff before B. B. Tuttle, a justice of the peace in Multnomah County, for the unlawful detainer of said premises, and prays that said contract of leasing may be specifically enforced, etc. The answer denies most of the allegations of the complaint. The case, being at issue, was referred to Hon. Raleigh Stott to take the evidence, and report the same, together with his findings of fact and law thereon, to the court. He found the facts to be substantially as alleged in the complaint; but found, as a conclusion of law, that the renting was valid for the term of one year, and therefore that the plaintiff had an adequate defense to the action of unlawful detainer, and he consequently reported for the dismissal of the suit.

Exceptions were taken to the report by each of the parties. The plaintiff moved to confirm the report, except the conclusion of law. The defendant moved to confirm all of the report except the first finding of fact, which is to the effect that the plaintiff had rented the house from the defendant for the term of two years, at a monthly rental of forty dollars, for her residence. The court below sustained the plaintiff's exceptions and overruled those of the defendant, and entered a decree specifically enforcing said contract against the defendant, from which he appealed to this court.

1. The first question presented for our consideration is one of fact. Did the defendant lease said property to the plaintiff on the terms alleged in the complaint? After a careful reading and consideration of all the evidence in the case on this subject, I think this question must be answered in the affirmative. The plaintiff testifies to the facts and circumstances intelligently and distinctly, and she is corroborated in her statements by other evidence. In addition to this, the facts and circumstances attending her occupancy tend very strongly to corroborate her; on the other hand, the defendant's denials are uncertain and equivocal. It is true, he makes the denial when forced to it by the direct interrogatory of his counsel; but when left to himself, the inference becomes very strong that the defendant bases his denial on the fact, not that the plaintiff did not enter into a parol agreement with him for the lease of the premises for two years, but on the ground that the lease was not in writing. His remark to Mr. Williams was: "She did n't get a lease";

and on another occasion he said: "She had no lease for the house."

2. But this contract, not being in writing, and being for a lease for a term exceeding one year, was, under sections 781 and 785, subdivision 6, of Hill's Code, ineffectual at law to create such title or interest as the plaintiff claims under it. But the plaintiff alleges part performance of said agreement on her part, and relies upon that to take the case out of the operation of the statute, and to that aspect of the case our attention must be directed.

3. It appears, from the evidence, that the plaintiff, with the consent of the defendant, entered into the possession of said premises, pursuant to said contract, about the 1st of July, 1888, and continued to reside there, without objection from the defendant, until about the month of November, during which time she paid the defendant the rent stipulated by said agreement. At the time, or soon after, she took possession of said premises, the plaintiff caused some shrubbery, rose-bushes, and the like, to be removed to said premises and planted in the yard; she purchased some expensive carpets, and had them cut and put down in the rooms; she caused considerable paper-hanging and painting to be done about the house, and enough coal and wood to be placed in the cellar to last her during the winter next ensuing after her occupancy commenced. In short, she did everything that a tenant would have done who understood that his occupancy was for a greater length of time than from month to month.

Do these acts, as part performance of this lease, on the part of both parties to it, entitle the plaintiff to have the same specifically enforced? I think they do. They are substantial on both sides, and go to the substance of the contract, and it would hardly be possible to restore the plaintiff to the condition she was in before the acts were performed. Relying upon the terms of the parol agreement, she incurred expenses, and changed her circumstances and condition, to such an extent that a refusal on the part of the defendant to perform operates as a fraud on the rights of the plaintiff. As I understand the rule, this is such a part performance of the parol agreement as takes the case out of the operation of the statute of frauds: *Arguello v. Edinger*, 10 Cal. 150; *Hotchkiss v. Downey*, 2 Day, 225; *Wilde v. Fox*, 1 Rand. 165; *Kidder v. Barr*, 35 N. H. 235; *Hawkins v. Hunt*, 14 Ill. 42; *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773; *Eyre v. Eyre*, 19 N. J. Eq.

102; *Puttman v. Halley*, 24 Iowa, 425; *Kay v. Watson*, 17 Ohio, 27; *Waterman on Specific Performance*, sec. 257.

4. Upon the argument, counsel for the appellant insisted that though we might be satisfied that the parol agreement was made as alleged, and that there had been such part performance as would take the same out of the operation of the statute of frauds, still this is not the kind of a case in which a court would decree a specific performance, and that the plaintiff must fail for that reason. But in this I think the counsel is mistaken. *Pomeroy on Specific Performance*, section 101, says: "As the statute speaks of lands, 'or any interest in or concerning them,' contracts to lease are both included within its terms, and are capable of being part performed, so as to be taken out of the operation of the statute, and made enforceable in equity. In most of the American statutes, all possible doubt upon this point has been removed by adding a clause to the section concerning lands, which expressly includes agreements to lease for a time not exceeding one year." This provision is found in our own statute: *Hill's Code*, sec. 785, subd. 6; *Taylor on Landlord and Tenant*, sec. 32. But it is useless to follow the subject; the authorities are uniform in favor of the rule I have stated.

5. The finding of the learned referee, to the effect that plaintiff's parol lease was good for a year, and therefore she had a good legal defense to the pending proceedings of unlawful detainer, did not go far enough. Her rights rest upon a more substantial equity than a defense to that proceeding. It is right to have the parol agreement specifically enforced by a decree, so that the same shall be fixed and certain, and that she may not again be subject to be harassed and vexed by such a petty proceeding.

The decree of the court below was right, and the same is affirmed.

EFFECT OF PAROL LEASE FOR MORE THAN ONE YEAR.—The statute of frauds having been adopted and incorporated in the statute law of each of the states of the American Union, it is generally considered that oral leases of lands create such an estate or interest therein that if made for a longer period than one year they are void, and cannot be enforced at law: *Rosenblatt v. Perkins*, 18 Or. 156; *Ragsdale v. Lander*, 80 Ky. 61; *Roberts v. Tennell*, 3 T. B. Mon. 250; *Brial v. Entwistle*, 10 Daly, 398; *Holderber v. Forrestal*, 13 Daly, 34; *Like v. McKinstry*, 41 Barb. 186; *Thurber v. Dwyer*, 10 R. I. 355; *Hammond v. Dean*, 8 Baxt. 193; *Shepherd v. Cummings*, 1 Cold. 355; *Oliver v. Alabama etc. Ins. Co.*, 82 Ala. 417; *Hammond v. Winchester*, 82 Ala. 470; *Parber v. Hollis*, 50 Ala. 411; *Shakespeare v. Ada*, 76 Ala. 351; *Os v. Lokas*,

19 Ill. 575; *Creighton v. Sanders*, 89 Ill. 543; *Warner v. Hale*, 65 Ill. 395; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Doser*, 22 Kan. 436; *Bard v. Elston*, 31 Kan. 274; *Deisher v. Stein*, 34 Kan. 39; *Bacon v. Parker*, 137 Mass. 309; *Sanford v. Johnson*, 24 Minn. 172; *Chaffe v. Benoit*, 60 Miss. 34; *Morrill v. Mackman*, 24 Mich. 279; 9 Am. Rep. 124; *Cos v. Hobby*, 72 N. Y. 141; 28 Am. Rep. 120; *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462; *Bel-ler v. Robinson*, 50 Mich. 264; *Durand v. Curtis*, 57 N. Y. 7; *Thomas v. Nel-son*, 69 N. Y. 118; *Laughran v. Smith*, 75 N. Y. 205; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 Cow. 226; *Friedhoff v. Smith*, 13 Neb. 5; *Web-ster v. Blodgett*, 59 N. H. 120; *Whiting v. Pittsburg etc. Co.*, 88 Pa. St. 100; *Thorp v. Bradley*, 75 Iowa, 50; *Raynor v. Drew*, 72 Cal. 307. An oral agree-ment to hire a shop for a year at a certain rent, and to pay the amount expended in fixing it up, will not support an action for the amount expended, as the agreement is within the statute: *McMullin v. Riley*, 6 Gray, 500. And an oral lease for a year at a fixed rental, and for a year thereafter at an increased rent, is but a single letting, and void under the statute: *Schmitt v. Louferty*, 29 Ind. 400; *Holderber v. Forrestal*, 13 Daly, 34. The majority of cases decide that an oral lease, or agreement for a lease to be made, for a year, or for a longer term, such term to begin at a future day, is void, and cannot be enforced on either side: *Olt v. Lohnas*, 19 Ill. 576; *Atwood v. Nor-ton*, 31 Ga. 507; *Parker v. Hollis*, 50 Ala. 411; *Martin v. Blanchett*, 77 Ala. 288; *Oliver v. Alabama etc. Ins. Co.*, 82 Ala. 417; *Briar v. Robertson*, 19 Mo. App. 66; *Jones v. Marcy*, 49 Iowa, 188; *Delano v. Cushing*, 4 Cosh. 42; *Ryan v. Kirchberg*, 17 Ill. App. 132; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wheeler v. Conrad*, 6 Phila. 209; *Whiting v. Pittsburg etc. Co.*, 88 Pa. St. 100; *Haw-ley v. Moody*, 24 Vt. 603; *Wolf v. Doser*, 22 Kan. 436. The principle upon which these cases is decided is, that the year within which a contract not in writing must be performed, in order to escape the bar of the statute of frauds, must commence from the date of the contract, and not from the date of entering upon its performance. On the other hand, a contrary doc-trine is maintained in several of the states, where it is determined that an oral agreement for a lease, or an oral lease for the term of a year or longer, to begin *in futuro*, is valid, and may be enforced: *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; following *Tillman v. Fuller*, 13 Mich. 113; *Stackberger v. Monteller*, 4 Ind. 461; *Huffman v. Starks*, 31 Ind. 474; *Sears v. Smith*, 2 Col. 287; *Steininger v. Williams*, 63 Ga. 475; *Sobey v. Briebee*, 20 Iowa, 105; *Nathan v. Stern*, 13 Daly, 390; *Young v. Dake*, 5 N. Y. 463; 55 Am. Dec. 356; *Becar v. Flues*, 64 N. Y. 518. A parol agreement for a future lease is not void, if it is possible that it may be performed within the time fixed by the statute: *Chaffe v. Benoit*, 60 Miss. 34; *Mackey v. Potter*, 34 Minn. 510; *Winters v. Cherry*, 78 Mo. 344; *Whiting v. Ohlert*, 52 Mich. 462; 50 Am. Rep. 265; *Raynor v. Drew*, 72 Cal. 307. And for this reason a parol lease for an indefinite time is not void as being within the statute: *Raynor v. Drew*, 72 Cal. 307; *Swan v. Clark*, 80 Ind. 57. A verbal lease which is void under the statute because made for a longer term than is allowed by it is nevertheless generally construed to be good and valid as a lease for a year, or from year to year, if possession is taken under it, and the tenancy can only be termi-nated and the lease annulled after notice to quit: *Friedhoff v. Smith*, 13 Neb. 5; *Schuyler v. Leggett*, 2 Cow. 660; *People v. Rickert*, 8 Cow. 226; *Blumenthal v. Bloomingdale*, 100 N. Y. 558; *Lounsbury v. Snyder*, 31 N. Y. 514; *Laugh-ran v. Smith*, 75 N. Y. 205; *Drake v. Newton*, 23 N. J. L. 111; *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462; *Strong v. Crosby*, 21 Conn. 389; *Swan v. Clark*, 80 Ind. 57; *Martin v. Blanchett*, 77 Ala. 288.

Some of these cases and those which follow show that such a lease is good from year to year, and regulates the tenancy in all other respects, as to when rent shall be paid, the tenant shall be given notice to quit, etc., except as to the duration of the term: *Reeder v. Sayre*, 70 N. Y. 160; 26 Am. Rep. 561; *Crabs v. Christian Union etc. Pub. Co.*, 17 Hun, 319; *Kopits v. Gustarus*, 48 Wis. 48; *Union Banking Co. v. Gittings*, 45 Md. 181; *Morrill v. Mackman*, 24 Mich. 279; 9 Am. Rep. 124; *Jennings v. McComb*, 112 Pa. St. 518; *Thurber v. Dwyer*, 10 R. I. 355; *Nash v. Berkmeiler*, 83 Ind. 536; *Lockwood v. Lockwood*, 23 Conn. 425; *Howard Ins. Co. v. Hope Ins. Co.*, 22 Conn. 394; *Larkin v. Avery*, 23 Conn. 304. An oral lease for more than a year under the statute is not valid, even for one year, unless the tenant has possession under it for that entire period: *Thomas v. Nelson*, 69 N. Y. 118; *Talamo v. Spitsmiller*, 120 N. Y. 37; *ante*, p. 607; *Prinl v. Entwistle*, 10 Daly, 398. And if the lease is for more than a year, and the rent under it is to be paid monthly, then possession under it will only operate as a lease from month to month: *Geiger v. Brown*, 6 Daly, 506; and the landlord, in order to terminate the tenancy, must give at the end of the month a month's notice to quit: *Anderson v. Prindle*, 23 Wend. 616; *People v. Darling*, 47 N. Y. 666; *Craigton v. Sanders*, 89 Ill. 543; *Brownell v. Welch*, 91 Ill. 523. In some jurisdictions a parol lease of lands for years is construed as creating only a tenancy at will, which does not entitle the tenant to notice: *Ellis v. Paige*, 1 Pick. 43; *Withers v. Larrabee*, 48 Me. 570; *Duke v. Harper*, 6 Yerg. 280; 27 Am. Dec. 462; *Robinson v. Deering*, 56 Me. 357-359. This rule is thus laid down in a late case. The mere fact that a tenant goes into possession under a parol lease void under the statute because for a longer period than one year does not create a tenancy from year to year, but is ineffectual to vest any term in the tenant; his possession, in the absence of any other agreement, only constitutes him a tenant at will, and fixes his liability to pay rent at the stipulated amount for the use and occupation: *Talamo v. Spitsmiller*, 120 N. Y. 37; *ante*, p. 607. A tenancy for life, created in parol, is nothing but a tenancy at will, revokable at the pleasure of the landlord: *Hooton v. Holt*, 139 Mass. 54; *Bailey v. Ward*, 32 La. Ann. 839. So a parol lease for three years subsequent to the time it was made vests no certain term in the lessee, and he is only a tenant at will: *Jennings v. McComb*, 112 Pa. St. 518. The statute of frauds of some of the states provides that a tenancy for three years may be created by parol lease, although a lease resting in parol for a longer term is void; still, if the lessee has gone into and holds possession, and has paid rent, he will be considered a tenant from year to year: *Railsback v. Walke*, 81 Ind. 409; *Nash v. Berkmeiler*, 83 Ind. 536; *Union Banking Co. v. Gittings*, 45 Md. 181; *Cody v. Quarterman*, 12 Ga. 386; *Wade v. City of Newbern*, 77 N. C. 460; *Drake v. Newton*, 23 N. J. L. 111. In New Jersey, an unwritten lease not exceeding three years from the making thereof, whereupon the rent reserved amounts to a two-thirds part at least of the full improved annual value of the thing demised, is valid for all purposes, before entry by the tenant, or anything done under it by either of the parties: *Birckhead v. Cummings*, 33 N. J. L. 44. But in order to render such lease valid, it must be shown that the rent reserved bears such proportion to the value of the demised property: *Gano v. Vanderveer*, 34 N. J. L. 293. In Pennsylvania, a parol lease for a longer term than three years creates only a tenancy at will: *Jennings v. McComb*, 112 Pa. St. 518. Such tenancy, like any other, may be subsequently changed into a tenancy from year to year, by payment and acceptance of the rent annually, or other circumstances indicating that to be the intention of the parties: *Dunn v. Rothermel*,

112 Pa. St. 272; *Talamo v. Spitzmüller*, 120 N. Y. 37; *ante*, p. 607. In Connecticut, an oral lease of land for any period of time is void: *Baton v. Whitaker*, 18 Conn. 222; 44 Am. Dec. 586; *Larkin v. Avery*, 23 Conn. 304. And the same rule applies to a mining lease made in North Carolina: *Briles v. Pace*, 13 Ired. 282.

A parol contract for a new and supplemental lease between the landlord and his tenant in possession under a former and subsisting lease is within the statute of frauds: *Crawford v. Wick*, 18 Ohio St. 190; especially if the new contract is materially different from the original lease: *Crommelin v. Thies*, 31 Ala. 412; 70 Am. Dec. 499; *Singer Mfg. Co. v. Sayre*, 75 Ala. 270; *Beller v. Robinson*, 60 Mich. 264. In *St. Louis etc. R. R. Co. v. Ludwig*, 6 Mo. App. 583, it is said that the statute was intended to operate on original parol leases, and not upon mere extensions in point of time of original leases in writing; hence where a tenant, under a written lease for years, holds over by consent, express or implied, this is evidence of a new contract, without any definite period for its termination, and is construed to be a tenancy from year to year, and the tenant will be presumed to hold under the terms of the original lease.

It is generally determined that in case of a verbal leasing of lands where the contract is not to be performed within one year, part performance, by entering into possession of the demised premises and occupying them for a while, will not, in a court of law, take the case out of the operation of the statute of frauds: *Warner v. Hale*, 65 Ill. 395; *Wheeler v. Frankenthal*, 78 Ill. 124; *Creighton v. Sanders*, 89 Ill. 543; *Jackson v. Pierce*, 2 Johns. 221; *Petsch v. Biggs*, 31 Minn. 392; *Norman v. Wells*, 17 Wend. 136. If, however, the tenant has gone into possession, and has fully performed his part of the contract, this is sufficient to take it out of the operation of the statute: *Rosser v. Harris*, 48 Ga. 512; *Moore v. Beasley*, 3 Ohio, 294; *Wilber v. Paine*, 1 Ohio, 248; *Winters v. Cherry*, 78 Mo. 344. Thus where the tenant, under a parol lease for two years, has cleared the land and done extra work on it, in order to retain possession to the end of his term, but is ejected at the end of the first year, there is such part performance as to take the case out of the statute, and enable him to maintain an action against the landlord for damages: *Steel v. Payne*, 42 Ga. 207. Or where the tenant has been in possession, the landlord may recover for the use and occupation of the premises for the time they were occupied, estimating the value of the same on the basis of a *quantum meruit*: *Warner v. Hale*, 65 Ill. 395; and the same remedy lies in favor of the tenant for services rendered: *Wolke v. Fleming*, 103 Ind. 105; 53 Am. Rep. 495. Where the lease is within the statute, and the tenant executes notes for the rents, takes possession, and occupies the land during the term, he is liable on the notes: *Gibson v. Wilcoxon*, 16 Ind. 333. Where by the terms of a verbal agreement to lease several parcels of land the lessee is to have the possession of one of the parcels immediately, but not of any of the others until a specified future time, and a designated portion of the crop to be raised on the different parcels when ready for the market is to be delivered to the landlord as the rent therefor, possession taken by the tenant of the portion to which he is entitled at once is not such part performance as will take the contract out of the statute of frauds as to those parcels to the possession of which he was not entitled, and the refusal of the landlord to deliver possession of them will not make him liable to the lessee in damages: *Myers v. Crowsell*, 45 Ohio St. 543.

Where the tenant has gone into possession under a parol contract for a lease, has paid installments of rent, made improvements, or otherwise ex-

pended money, these acts are in equity generally considered as such part performance as will take the lease out of the statute of frauds, and entitle the tenant to specific performance of the contract. Thus specific performance of an agreement to give a lease will be decreed where the lessee has entered, paid rent, and put his carpets to fit the rooms: *Wendell v. Stone*, 39 Hun, 392. Or specific performance will be decreed after acts of part performance, such as fencing the land, building houses, and paying taxes: *Merrison v. Peay*, 21 Ark. 110. And where the tenant, by virtue of an oral lease, takes possession of the leased property, and continues therein for five years, plants, cultivates, and raises hedges thereon, breaks up and cultivates the ground, builds houses, and digs wells on the land, and pays the taxes, the lease is taken out of the statute of frauds, and may be enforced for the full term: *Bard v. Elston*, 31 Kan. 274. Or where the landlord enters into a parol agreement to execute to another a written lease of land for more than a year, and such other person, in pursuance of such agreement, enters into possession, and expends time, labor, money, and materials in making improvements upon the land, and in putting it in condition to use and enjoy during the term of the contemplated lease, there is such part performance as takes the case out of the statute; and if the landlord afterwards refuses to execute the lease, and ousts the lessee from the premises, the latter may in equity recover damages: *Deisher v. Stein*, 34 Kan. 39.

When the tenant has taken possession of land under an oral lease for more than a year, and paid an installment of rent, this is such part performance as will take the case out of the statute, and support a decree for specific performance, either on the part of the lessor or lessee, as the case may be: *Grant v. Ramsey*, 7 Ohio St. 158; *Eaton v. Whitaker*, 18 Conn. 222; 44 Am. Dec. 586; *Steininger v. Williams*, 63 Ga. 475; *Shakespeare v. Alba*, 76 Ala. 351. Or if the tenant has taken possession and made improvements, this is such part performance as will take the contract for the lease out of the statute, and justify a decree of specific performance against the landlord: *Wharton v. Stoutenburgh*, 35 N. J. Eq. 286; *Benjamin v. Wilson*, 34 Minn. 517. Although the tenant is entitled to specific performance, still, such entry and improvements under the contract is no defense at law to an action of unlawful detainer commenced after a year from making the contract: *Brochway v. Thomas*, 36 Ark. 518. The specific performance of an expired parol lease may be granted, when the parties have rights under a later written lease requiring its determination: *Switzer v. Gardner*, 41 Mich. 164. Where the bill prays specific performance of a parol contract for a leasehold interest in lands, and the defendant avers that the terms of the contract were other than as alleged, and a contract is proved, materially different from that alleged in the bill or answer, the court may, with the consent of the plaintiff, decree specific performance of the contract as proved, or rescind it and put the parties in statu quo: *West Virginia Oil Co. v. Vinal*, 14 W. Va. 637.

It follows, as a necessary result of the decisions hereinbefore cited, that whether a lease is oral or written is not very material, if the lessee has entered into possession and paid rent under it, and can establish its terms to the satisfaction of the court to which he resorts for the purpose of compelling specific performance. In other words, a lease may be regarded as a sale of a limited interest in real estate, and though, like a sale of the fee, it ought to be evidenced by some writing in substantial conformity to that exacted by the statute of frauds, it may, like a sale of the fee, be followed by acts constituting such a part performance as to remove it from the operation of that statute, and entitle the lessee to compel the lessor to execute the appropriate

evidence of the demise. The cases falling under our observation may be divided into three classes: 1. Those in which there was an oral agreement for the execution of a written lease: *Deisher v. Stein*, 34 Kan. 39; *Clark v. Clark*, 49 Cal. 586; *McCarger v. Rood*, 47 Cal. 138; *Seaman v. Aschermann*, 51 Miss. 678; 37 Am. Rep. 849; 2. Those in which the lessee has, pursuant to the terms of a parol lease, constructed on the leased premises improvements of substantial value: *Bard v. Wlston*, 31 Kan. 274; *Morrison v. Leary*, 21 Ark. 110; *Wilber v. Paine*, 1 Ohio, 251; *Steel v. Payne*, 42 Ga. 207; and 3. Cases in which the lessee has paid the rent, or some part thereof, pursuant to the terms of an oral lease: *Grant v. Ramsay*, 7 Ohio St. 158; *Eaton v. Whitaker*, 18 Conn. 222; 44 Am. Dec. 656; *Steininger v. Williams*, 63 Ga. 475; *Shakespeare v. Alba*, 76 Ala. 351. Where possession has been taken and is held pursuant to the terms of the lease, specific performance has been decreed in each of these classes of cases; and while the right to this relief appears to be less questionable in the cases of the first and second class, we have met no case which necessarily limits relief to those classes. If a person already in possession of premises as a tenant verbally contracts with the landlord for a new term, his mere continuance in possession thereafter is not such an act of part performance as will justify a decree for specific performance: *Spaulding v. Comelman*, 30 Mo. 177; *Maharra v. Blunt*, 20 Iowa, 142; *Armstrong v. Kattenhorn*, 11 Ohio, 265; *Railsback v. Walke*, 81 Ind. 409; *Crawford v. Wick*, 18 Ohio St. 190; *Jones v. Peterman*, 3 Serg. & R. 543; 8 Am. Dec. 672. Mere introductory or ancillary acts or improvements made by the landlord in anticipation of a lease, though attended with expense, cannot, as acts in part performance, take a lease resting in parol out of the operation of the statute: *Bacon v. Parker*, 157 Mass. 309. Still, as we have seen, the tenant may recover compensation for improvements or repairs made upon the faith of the parol lease after he has gone into possession and partly performed his part of the contract: *Petty v. Kennon*, 49 Ga. 468; *Brockway v. Thomas*, 36 Ark. 518; *Findley v. Wilson*, 3 Litt. 390; 14 Am. Dec. 72; *Parker v. Tainter*, 123 Mass. 185; *White v. Wieland*, 109 Mass. 291. It seems that, in some instances, the proper remedy of the tenant in such case is in equity: *Welsh v. Welsh*, 5 Ohio, 425. When the landlord has resumed possession after part performance by the tenant in possession under the parol lease, he is not entitled to specific performance of the remaining term under the contract: *Heoper v. Dwinell*, 48 Ga. 442.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

McCAULEY v. KELLER.

[130 PENNSYLVANIA STATE, 82.]

CONTRACTS — PAROL EVIDENCE TO VARY. — A new and distinct agreement made subsequently to a contract under seal, whereby, upon a new consideration, the original contract was changed, and an agreement entered into to perform additional work, or the same work in a different manner, may be proved by parol, without violating the rule that extrinsic evidence is not admissible to contradict or alter a written instrument. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it is made, and the special contract will be pursued as far as it can be traced in the intention of the parties.

CONTRACTS — SUBCONTRACT GOVERNED BY TERMS OF ORIGINAL CONTRACT. — Where a written contract calling for a certain class of work provides that all work is to be done as directed by the engineer in charge, and is to be paid for as estimated by him, and such contract is subsequently changed by a subcontract resting in parol, calling for a better class of work, the estimate of the engineer, made fairly and without fraud, as to the value of the work performed under the subcontract, is final and conclusive on the parties, and not open to the opinion of those who casually observed the work.

ASSUMPSIT to recover a balance alleged to be due for work done under contract. The defendants, a partnership doing business under the name of Keller and Bush, took a contract for the construction of the Clearfield and Jefferson railroad, from one Green, who was the general contractor of the railroad company. They gave Peter McCauley, the plaintiff, a subcontract to do the masonry work on the part of the road between the towns of Irvona and Mahaffey. This work was done by him, under his subcontract, during the year 1886.

Keller and Bush entered into another contract with McCauley, on March 25, 1887, by which he was to do the masonry work on that part of the railroad between Mahaffey and Williams's Run. This contract was under seal, and was as follows: —

“ Articles of agreement made and concluded this twenty-fifth day of March, 1887, between John Keller and L. L. Bush, of Lancaster City, state of Pennsylvania, of the first part, and Peter McCauley, of Philipsburg, Centre County, state of Pennsylvania, of the second part. — Agreed, That the said party of the second part will do all the masonry necessary for the completion of the Clearfield and Jefferson railway between Mahaffey and Williams's Run, in a good and workman-like manner, the same as masonry on same line between Irvona and Mahaffey. Said party of the second part to furnish all labor and material needed to do said masonry; also to do the masonry first where it will be necessary to start grading, or as may be desired by the superintendent of the said Keller and Bush. All work to be done as directed by the chief engineer of said railway. For which the said parties of the first part promise to pay to the said party of the second part the sum of \$5.50 for all second-class masonry, and \$2.50 for box-culvert masonry, the same prices to be paid for cubic yards. All work to be paid for as estimated by the engineer in charge during the month, and payments to be made on or about the 20th of the succeeding month, less ten per cent, which shall be kept back until the completion of the work.

“ PETER McCAULEY. [Seal.]

“ JOHN KELLER AND L. L. BUSH. [Seal.]

“ Per JOHN KELLER. [Seal.]

“ Witness: J. A. CARTER.”

The engineer in charge, spoken of in the contract, was employed by the railroad to supervise the work of construction of the road, and had personal charge of it. McCauley commenced the performance of this contract by putting in such masonry as he had constructed during 1886. The engineer in charge refused to accept this grade of work, and required masonry of a superior quality to be put in. Keller then agreed to pay McCauley an extra compensation for all work done as required of the engineer of a better class than that called for in the contract. Under this agreement, McCauley went on and completed the masonry work, in first-class condition and with first-class materials. Defendants then refused to pay the amount claimed to be due for the extra work, under the parol

agreement, but offered to pay, and made a tender of, the amount due under the sealed contract.

Verdict for plaintiff for \$11,889.45, in addition to the tender. Judgment on the verdict, and defendants appealed. Other facts are stated in the opinion.

George A. Jenks, G. D. Jenks, W. P. Jenks, and E. H. Clark, for the appellants.

B. J. Reid, R. C. Winslow, J. E. Calderwood, and Charles Corbet, for the appellee.

CLARK, J. It is very plain that the parties to this contract had in contemplation that no part of the masonry between Mahaffey and Williams's Run would be first-class. It was to be the same as the masonry between Irvona and Mahaffey, which had been constructed in the previous year, and was considered second-class. The contract, in specifying the prices to be paid, made no provision for any first-class work. It is equally clear that the work was to be done "as directed by the chief engineer" of the company, and that "the work was to be paid as estimated by the engineer in charge during the month, payments to be made, according to that estimate, about the 20th of the succeeding month, less ten per cent," etc. Under the written contract, therefore, the engineer was the arbiter of the kind of work to be done, as well as of the class to which it belonged; and his decision determined the compensation which the plaintiff was entitled to receive under his contract. It turned out, however, that at certain points on the line masonry of a higher class and grade was required by the engineer than was contemplated by the parties, and the contract fixed no price for this higher grade of work. It is alleged, on the part of the plaintiff, that when this exigency arose, the defendants instructed the plaintiff that the work should be done "as directed by the engineer," and that they would pay the plaintiff what it was reasonably worth; that the work required for arch masonry was of a superior quality and workmanship, and that the whole work, as completed under the requirements of the engineer, was of a better quality than that between Irvona and Mahaffey, which was mentioned in the contract as descriptive, in a general way, of the kind of work to be done; and this suit is brought, not only to recover for "extra" work, — that is to say, for what the work done was worth more than was stipulated in the contract, — but

also for the balance remaining upon the work done under the special contract.

It was undoubtedly competent for the plaintiff, by parol, to show a new and distinct agreement subsequent to the contract under seal, whereby, upon a new consideration, the original agreement was changed, and the plaintiffs agreed to perform additional work, or the same work in a different manner. The rule that extrinsic evidence is not admissible to contradict or alter the written instrument is not thereby infringed: 1 Greenl. Ev., sec. 303; *Malone v. Dougherty*, 79 Pa. St. 58; *Collins v. Barnes*, 88 Pa. St. 15. But in such cases the special contract will be pursued as far as it can be traced in the intention of the parties. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it was made. The theory of the plaintiff's case is, that, according to the doctrine established in *Vicary v. Moore*, 2 Watts, 457, 27 Am. Dec. 323, *Spangler v. Springer*, 22 Pa. St. 454, and other cases, to which it is unnecessary to refer, the parol agreement drew or retained the stipulations of the sealed instrument in parol, and turned the plaintiff over to his action of *assumpsit* for the balance due upon the entire work; that the provisions of both contracts thus became one entire parol agreement; and it is upon this ground, as we understand the case, that the plaintiff bases his right to recover his whole claim in this form of action. It is plain, then, that the sealed instrument must be supposed to contain the agreement of the parties to the full extent that it has not been modified by the subsequent parol contract, and that both, taken together (the former being subject to the latter), state the agreement of the parties. If there had been no provision for estimates, etc., the plaintiff would, without doubt, have been entitled to recover upon a *quantum meruit* whatever he could show the work was worth; but all the work was to be done as directed by the engineer, and was to be paid for as estimated by the engineer in charge during the month.

The work covered by the parol agreement was the same work which was embraced in the special contract. It is alleged, simply, that it was to be performed in a different way, if the engineer required it to be so done; and if the estimate of the engineer was not to determine its nature and extent, it would doubtless have been so stated. The masonry was to be the same as masonry on the same line between Irvona and Ma-

haffey; but it was to be paid for as estimated by the engineer in charge during the month. If the work, under the requirements of the engineer, was of a higher class, it was for the engineer to determine and designate the class of work to which it belonged, according to the usual and customary methods in railroad construction. It is not to be supposed the parties intended that the engineer, in making his estimates from time to time, was to compare, in detail, the work of 1887 with that of 1886, and that the compensation was to be rated accordingly. The contract provides the price to be paid for second-class work, the nature and characteristics of which were presumably known to the engineer; and this, of itself, indicates that the work was to be estimated according to a certain classification recognized in the business, and was to be compensated accordingly. Upon that basis of calculation, the defendant would be held for the difference between the value of the work required and the sum stipulated in the contract. If the parties fixed any price for the work which was required to be done in a superior manner, that price would govern in the calculation of the amount; if not, the value of this class of work could be otherwise readily shown. But the kind and classification of work was for the engineer, and his estimates, monthly and final, were conclusive upon both parties.

Although the character of the work to be performed is described, in a general way, as the same as the masonry between Irvona and Mahaffey, yet it was to be done "as directed by the engineer of the company," and in a good and workman-like manner. Although, as between the contracting parties themselves, the work would be satisfactory if it was the same as the masonry between Irvona and Mahaffey, yet it was required to be done as directed by the engineer. McCauley entered into this contract with notice of the duties and powers of the company's engineer. He took his chances with the engineer, and was to receive pay as for second-class work. It is conceded that the masonry between Irvona and Mahaffey was second-class work of an inferior quality; but this work, although of the same class, was to be performed in a good and workman-like manner, as directed by the engineer. First-class work was not contemplated, but when work of that class was afterwards required, the parties appear to have provided for it in a subsequent parol agreement. How much of this first-class work the engineer directed to be done, and how much was

2 actually performed, in pursuance of his direction, was for the
3 engineer to estimate; and his certificate, fairly made, without
4 fraud, was, by the terms of the contract, binding upon the
5 parties. We are of opinion, therefore, that the court erred in
6 throwing this inquiry open to the opinion and estimate of
7 those who casually observed the work, the parties having
8 designated a person for this purpose,—a person whose classification
9 of the work and measurement of the amount were necessarily binding in the computation of the plaintiff's claim.
10 That the parties so understood their contract is shown by the
11 fact that monthly settlements were made upon the estimate of
12 the engineer, and the work was paid for and receipts taken in
13 accordance therewith. The estimates, it is true, were in some
14 instances modified and changed, but the classification and
15 measurement of the engineer constituted the general basis
16 upon which these settlements were made.

It is unnecessary, we think, to consider the assignments of error in detail. If we are right in what we have said, the case was tried under a mistaken view of the nature and obligations of the contract. If at the retrial the cause is conducted upon the theory suggested in this connection, the other matters assigned for error cannot arise.

The judgment is reversed, and *venire facias de novo* awarded.

CONTRACTS — PAROL TESTIMONY — NEW AGREEMENT. — A contract under seal may be annulled by a new agreement resting in parol, followed by actual performance of the substituted agreement: *McCreery v. Day*, 119 N. Y. 1; 16 Am. St. Rep. 793, and cases cited in note.

COMMONWEALTH v. FLEMING.

[180 PENNSYLVANIA STATE, 188.]

SALE C. O. D., WHEN COMPLETE. — Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the sale on the part of the seller is complete, and the purchaser may hold the goods for the price of which he is then liable.

SALE C. O. D. — LIABILITY OF CARRIER. — Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the latter becomes the agent for the receipt and transmission of their price. The sale is complete on the part of the seller; and whether the carrier receives the price or not at the time of delivery, he is liable to the seller for the price if he does deliver.

SALE C. O. D., WHEN COMPLETE. — Where a seller has received an order from a purchaser to send him goods C. O. D., and the goods are delivered to the carrier, the title does not pass until the delivery of the goods;

still, the sale is completed by delivery to the carrier, and the right of the seller to recover the price from the purchaser if he refuses to take them is as complete as if he had taken them and not paid for them.

SALE C. O. D., WHEN COMPLETE.—A licensed liquor dealer who receives an order from a purchaser residing in another county, where the dealer has no license to send him liquor C. O. D., and accepts the order, and delivers the liquor to a carrier under agreement to collect on delivery, cannot be convicted of selling liquor without a license in the county where the purchaser resides, as the sale is complete on the part of the dealer when he delivers the liquor to the carrier at his place of business.

DEFENDANT, who holds a license authorizing the sale of liquor in Pittsburgh and Allegheny County, went to Mercer, in Mercer County, and by public notice given in the local newspapers, and by the distribution of circulars, informed the people that he would supply them with liquors if ordered C. O. D. In consequence, he received orders from individuals in Mercer, and sent them liquor in packages marked "glass," or "medicine," and sent and marked "C. O. D." The packages were carried by the express company, who delivered them and collected the price thereof. Defendant was indicted, tried for, and convicted of selling liquors in Mercer County without a license, and he prosecutes this appeal.

George Shiras, Jr., and William S. Pier, for the appellant.

J. A. Stranahan, S. H. Miller, and G. W. McBride, district attorney, for the commonwealth.

GREEN, J. In the case of *Garbracht v. Commonwealth*, 96 Pa. St. 449, 42 Am. Rep. 550, which was an indictment for selling liquor without license, we held that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier who, for the purposes of delivery, represents him." In that case, the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier, to be forwarded to its destination in Mercer County. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal, held any license for the sale of liquor in Mercer County. This decision was not changed in the least upon a subsequent trial of the same defendant,

upon a different state of facts, as reported in 1 Pennypacker, 471. In the case now under consideration, the liquor was sold upon orders sent by mail by the purchasers, living in Mercer County, to the defendant, who is a wholesale liquor dealer in Allegheny County. The goods were set apart at the defendant's place of business, in Allegheny County, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer County, and by the carrier transported to Mercer County, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the case of *Garbracht v. Commonwealth*, 96 Pa. St. 449, 42 Am. Rep. 550, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of *Garbracht*.

It is claimed, and it was so held by the court below, that because the goods were marked "C. O. D." the sale was not complete until the delivery was made, and as that took place in Mercer County, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was, simply, that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, that the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is, that the price of the goods is to be collected by the carrier at the time of delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liability to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the seller to the carrier; and

whether the carrier receives the price or not at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods.

Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them; and in such circumstances, the seller would be entitled to recover the goods. This was the case of *Henderson v. Lauck*, 21 Pa. St. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser, absolutely, to pay the price to the carrier; and if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is, of course, liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but as he had received the goods from one who was authorized to deliver them, his right to hold them, even as against the seller, is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery

to the purchaser by the carrier, without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case, it is the duty of the purchaser to receive the goods from the carrier, and at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete, and he may recover the price of the goods from the purchaser, whether the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is in fact no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case, it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although in point of fact he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed, but performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the con-

tract between the parties, regarded as a contract for civil purposes only.

The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to and are to be performed by the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is *Higgins v. Murray*, 73 N. Y. 252. There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with and did not affect his right to enforce the defendant's liability. In the course of the opinion, Chief Justice Church said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent; his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. . . . Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien, the same as when the request was made. As the article was shipped at the request of and for the benefit of the defendant (assuming that it was done in accordance with the directions), it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. . . . As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article,

though in point of fact it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In Hutchinson on Carriers, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.], undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty,—that of collection; and if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal *status* of the parties results, that the seller has a remedy for the price of his goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale, and the right of the seller to recover the price from the purchaser if he refuse to take

them is as complete as if he had taken them and not paid for them.

Thus far we have regarded the transaction between the parties in its aspect as a civil contract only; but when viewed in its aspect as the source of a criminal prosecution, the transaction becomes much more clear of doubt. It is manifest that when the purchaser ordered the goods to be sent to him C. O. D., he constituted the carrier his agent, both to receive the goods from the seller and to transmit the price to the seller. When, therefore, the goods were delivered to the carrier at Pittsburgh for the purpose of transportation, the duty of the seller was performed, as we have already seen, so far as he and the purchaser were concerned, and as between them the transaction was complete. The duty of transportation devolved upon the carrier, and for this he was, in one sense, the agent of the seller, as well as of the purchaser; but as it was to be at the expense of the purchaser, the delivery to the carrier was a delivery to the purchaser; and this was ruled in Garbracht's case. The injunction to the carrier to collect the money on delivery imposed an additional duty on the carrier, which the carrier was, of course, bound to discharge. This arrangement was a matter of convenience, both to the purchaser and the seller, relative to the payment and transmission of the price; but that is all. To convert this entirely innocent and purely civil convention respecting the mode of collecting the price of the goods into a crime is, in our judgment, a grave perversion of the criminal law, to which we cannot assent. As a matter of course, there is an utter absence of any criminal intent in the case. The defendant had a license. The sale was made at his place of business, and both the sale and delivery were completed within the territory covered by the license. If, now, a criminal character is to be given to the transaction, it must be done by means of a technical inference that the title did not pass until the money was paid; and thus that the place of sale, which in point of fact was in Allegheny County, was changed to Mercer County, where no sale was made. Even granting that, in order to conserve the vendor's lien, such a technical inference would be justified for the purposes of a civil contract, it by no means follows that the plain facts of the case must be clothed with a criminal consequence on that account. So far as the criminal law is concerned, it is only an actual sale without license that is prohibited. But there was no such sale, because all the essential facts which consti-

tuted the sale transpired in Allegheny County, where the defendant's license was operative. The carrier, being the agent of the purchaser to receive the goods, does receive them, from the seller, in Allegheny County, and the delivery to him for the purpose of transportation was a delivery to the purchaser. This is the legal, and certainly the common, understanding of a sale. The statute, being criminal, must be strictly construed; and only those acts which are plainly within its meaning, according to the common understanding of men, can be regarded as prohibited criminal acts. We cannot consider, therefore, that a mere undertaking on the part of the carrier to collect the price of the goods at the time of his delivery to the purchaser, though the payment of the price be a condition of the delivery, can suffice to convert the seller's delivery to the carrier for transportation and collection into a crime. We therefore hold that the sales made by the defendant upon orders C. O. D. received from the purchasers were not in violation of the criminal statute against sales without license, and the conviction and sentence in the court below must be set aside.

The judgment of the court of quarter sessions is reversed, and the defendant is discharged from his recognizance upon this indictment.

WILLIAMS, J., dissented, and expressed it as his opinion, upon the facts, that the transaction was, both on principle and authority, a sale and delivery at Mercer, and not at Pittsburgh. To his mind, it appeared that the sale was no more complete until the liquor was delivered in Mercer than if the defendant had taken it there in person, and delivered it on receipt of the price, or if he had sent a clerk from his store with it, under the same conditions. His employment of the carrier to carry and deliver it, and to collect the bill, simply made him his agent for delivery and collection, the same that his clerk would have been. The duty of the carrier, as such, ended with the transportation of the package. The undertaking to deliver, and collect the price, made the carrier the agent or factor of the consignor, for that purpose, and the title remains in the vendor until delivery is made; then if payment is not made to the agent, the package is returned to the vendor.

The writer of the dissenting opinion accepts as correct the rule laid down in *Hutchinson on Carriers*, section 389, regarding goods sent C. O. D., as follows: "Goods are frequently sent, especially by the express carrier, with instructions not to deliver them until they are paid for. In such cases, it is understood that the payment of the price and the delivery of the goods are to be concurrent acts. The carrier who accepts the goods with such instructions undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of the goods"; and cites, as recognising this rule, and holding that the title remains in the consignor until

delivery in accordance with the conditions, *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24; *Harrington v. McShane*, 2 Watts, 443; *Taylor v. Walk*, 3 Watts, 65; *The Venus*, 8 Cranch, 253; and *State v. O'Neil*, 58 Vt. 140, where it is said that "an express company carrying goods on order of the seller to deliver to purchasers C. O. D. is the agent of the seller, and title does not pass until after the performance of the conditions precedent, viz., delivery and payment."

His honor acknowledges that *Higgins v. Murray*, 73 N. Y. 253, appears to hold a contrary doctrine, but contends that the case is not authority for the rule laid down in the controlling opinion in this case, for the reason that it turned upon an entirely different question, namely, the right of a manufacturer to payment when he has completed the article contracted for by his customer.

The case of *Commonwealth v. Greenfield*, 121 Mass. 40, is then cited, and epitomized as follows: A dealer in liquors was licensed to sell in Pittsfield. He received an order for twenty dozen bottles of lager from Lee. He carried the bottles to his customer at Lee, and delivered them to him there. When indicted for the sale, he set up his license to sell at Pittsfield, and alleged that setting apart the bottles at his store in Pittsfield completed the sale, and passed the title to his customer; but the court held otherwise, saying: "The evidence, . . . to say the least, warranted the inference that the defendant . . . did not intend to part with the title until he actually delivered the goods at Lee according to the terms of the order. If such was the fact, the goods, while in the wagon of the seller, remained his property, and at his risk, and the sale was completed at Lee, and not at Pittsfield."

From this review of the authorities, it is contended and concluded that the sales made by defendant were made at Mercer, where he delivered the liquor, and not at his store at Pittsburgh. As to his guilt and violation of the liquor law in so doing, the learned judge says: "The law under which defendant held his license forbade him to sell outside his place of business. The evidence shows that he made sales, not only outside of his store, but outside the county of Allegheny. He did what the law clearly said he should not do, and he thereby subjected himself to punishment."

On the question of evil intent, the evidence was ample to support conviction. It showed that the defendant left his place of business, and went into another county, where he had no license, and sought to make sales in that county. It showed that, through the newspapers, and by means of circulars, he invited orders, promised to fill them, and to deliver the liquor to the consumer at his house or place of business upon payment of the price and cost of carriage. It showed that, to escape notice, and divert attention from the character and extent of the business, he sent the packages, marked "glass," or "medicine." This would justify a finding that he knew his sales were not authorized by his license, and that he intended to violate the law. It was enough, however, to justify a conviction that he sold and delivered liquors in the county where he had no license. If these sales were made to members of the prohibited classes, he might be prosecuted, the same as though he had delivered the liquor himself. He was bound, under the law, to know to whom he was selling, and it was upon such conditions that his license was granted him. He had no right to violate the law, and to allow his shipping clerk to fill orders for liquors, without knowing the age, habits, sanity, or condition of the consumers, when the sale was completed by delivery to them. Sales thus made were ground for the revocation of his license, and for his conviction under the indictment.

Clark and McCollum, JJ., concurred in the dissenting opinion.

SALES C. O. D.—WHEN CONSUMMATED.—As to when sales C. O. D. become consummated and complete, see *State v. Carl*, 43 Ark. 353; 51 Am. Dec. 565, and particularly note, 570-572.

CARRIERS—DELIVERY OF C. O. D. GOODS.—The consignee of goods to be paid for when delivered may inspect them before acceptance, and the carrier does not become responsible for the price by allowing him the privilege of inspection: *Lyons v. Hill*, 46 N. H. 49; 88 Am. Dec. 189.

SALES OF WHISKY—WHEN CONSUMMATED.—An order for whisky, at a place where it can be lawfully sold, to be delivered to a carrier for transportation to a place where it is not lawful to sell it, was filled by the dealer. The sale became consummated by separating the whisky from the common stock and delivering it to the carrier: *Dusen v. State*, 82 Ga. 27; but without a separation of the liquor, the sale is not complete: *State v. Basserman*, 54 Conn. 88. But in *Bagby v. State*, 82 Ga. 786, where a dealer whose place of business was beyond the limits of a prohibition county received an order for whisky, to be delivered in the prohibition county, and did deliver it there, and received payment therefor, the sale was decided to be consummated in the prohibition county, there being no intermediate delivery to a carrier. And in *Berger v. State*, 50 Ark. 20, it was held that the sale was not consummated by delivering the whisky to the carrier at a place where it could be lawfully sold, when the consignee was the agent of the dealer to deliver the liquor, when received from the carrier, to the purchasers at a place where it was against the law to sell whisky.

COMMONWEALTH v. SHUTTE.

[180 PENNSYLVANIA STATE, 272.]

CRIMINAL LAW—INDICTMENT—JOINDER OF COUNTS IN.—Where an indictment containing two counts for the same act, one charging robbery, and the other larceny as bailee, against the defendant, is certified to the proper court for the trial of the higher offense, the defendant may be there tried and convicted of the larceny as bailee, although acquitted upon the count charging robbery.

CRIMINAL LAW.—UNDER INDICTMENT charging a particular crime, the defendant may be convicted of a lesser offense included within it.

H. N. Snyder, for the appellant.

J. W. King and D. B. Heiner, district attorney, for the commonwealth.

By COURT. The defendant below was convicted of the offense of larceny as bailee. The indictment contained two counts, one charging robbery, and the other larceny as bailee. It was found in the quarter sessions, and certified into the oyer and terminer. The jury acquitted the defendant upon the count charging robbery, and she now contends that the count upon which she was convicted was improperly joined with that for robbery, which is exclusively triable in the oyer and terminer. In other words, that the oyer and terminer can

only try indictments found in the quarter sessions, and certified into the oyer and terminer according to law, and that, under section 32, act of March 31, 1860 (P. L. 438), the court of quarter sessions can only lawfully certify indictments found in the quarter sessions for crimes or offenses not triable therein. The answer to this objection is obvious. The indictment charges robbery, which is triable exclusively in the oyer and terminer; hence it was properly certified into that court. Does the fact that it also contained a count for an offense triable in the quarter sessions oust the jurisdiction of the oyer and terminer? If so, we would have the anomaly of an indictment which could not be tried in either court. The quarter sessions could not certify one count only into the oyer and terminer. Nor do we think there was a misjoinder. While the evidence is not given, it is manifest that both counts were for substantially the same offense. The higher offense was not proven, but the defendant was convicted of the larceny as bailee of the same property referred to in the first count. The offense charged in the second count was not repugnant to that charged in the first. It was a constituent part of the same offense. The general rule is well settled that upon an indictment charging a particular crime the defendant may be convicted of a lesser offense included within it. A person charged with burglary may be convicted of larceny: *Hunter v. Commonwealth*, 79 Pa. St. 503; 21 Am. Rep. 83. A count charging assault with intent to ravish may be included in a count charging rape: *Harman v. Commonwealth*, 12 Serg. & R. 69. These authorities, and many others that might be cited, show that there was no misjoinder. Nor was the defendant injured in any way. Her rights were not jeopardized by the joinder of the two counts, nor was she deprived thereby of any legal benefit or privilege at the trial. Her objections are purely technical, and without merit. As was observed in *Hunter v. Commonwealth*, 79 Pa. St. 503, 21 Am. Rep. 83: "The tendency of modern legislation and judicial decision is to disregard mere technicalities, and to regard the substance, rather than the form."

Judgment affirmed.

CRIMINAL LAW.—JOINDER OF COUNTS.—The law as to joining counts in one indictment is discussed in the note to *State v. Bell*, 92 Am. Dec. 661-664; *People v. Aikin*, 66 Mich. 460; 11 Am. St. Rep. 512.

CRIMINAL LAW.—Under an indictment for a crime, the defendant may be convicted of any lesser crime included thereunder: *Whilden v. State*, 25 Ga. 396; 71 Am. Dec. 181, and note; *Hunter v. Commonwealth*, 79 Pa. St. 503; 21 Am. Rep. 83, and foot-note.

AIKEN v. PENNSYLVANIA RAILROAD COMPANY.

[180 PENNSYLVANIA STATE, 380.]

NEGLIGENCE — EVIDENCE — NONSUIT. — In an action against a railroad company for negligently killing a person while on the track, at a street crossing, where the plaintiff's evidence establishes the indisputable fact that the deceased saw the train approaching while he was in a place of safety, and voluntarily took the chances of crossing in front of it, evidence as to the danger of the place, the rate of speed of the train, the absence of warning, and the obstructions to sight and hearing become wholly unimportant, and plaintiff should be nonsuited, or a verdict directed against him.

CONTRIBUTORY NEGLIGENCE. — The rule that a person in a position of danger is not responsible for a mistake of judgment in getting out is subject to the qualification that he must have got into danger without negligence or fault of his own.

NEGLIGENCE — DUTY TO STOP, LOOK, AND LISTEN. — The rule that a man, before crossing a railroad track, must stop, look, and listen, applies equally to persons walking as to persons driving. It is not a rule of evidence, but of law, peremptory, absolute, and unbending, and a failure to observe it is not merely evidence of negligence, but negligence *per se*.

TRESPASS by Elizabeth Aiken against defendant to recover damages for the alleged negligent killing of her husband, S. B. Aiken, by the defendant company. Plea not guilty. Verdict and judgment for plaintiff, and defendant appeals.

George B. Gordon, John H. Hampton, and William Scott, for the appellant.

J. W. Kirker, for the appellee.

MITCHELL, J. This is a perfectly clear case of contributory negligence, unrelieved by any circumstance which the jury should have been allowed to consider as an excuse for a violation of the plainest dictates of prudence and the settled rules of law. The deceased, at nine o'clock, on a rather dark night in January, was walking along Penn Avenue, in the borough of Wilkinsburgh, and came to the railroad, which at that point had then ten or eleven tracks at grade, occupying a space of about 150 feet. It was intrinsically a dangerous place, and at the particular time was made more than usually so by standing cars and piles of pipe and railroad ties, which obstructed the view on one side, and on the other side a train on one of the tracks, with an engine blowing off steam. In the face of these manifest dangers, the deceased and his companion walked straight on, without stopping, until they had crossed six or seven tracks, when they saw an approaching train. At

this moment, they were either on a spur-track that ends a few feet beyond the crossing, or between it and the first passenger-track, on which the train was coming. Counting the spur-tracks as safe, they had a space of forty-five feet of actual safety in which to wait the passage of the train; but as there is no evidence that they knew that the so-called spur-tracks were not ordinary tracks, liable to be used at any time, it is hardly proper to charge them with the knowledge. But from the nearest spur-track, which they were on or had just crossed, to the passenger-track on which the train was, there was a clear space of twelve feet, in which deceased might have waited in safety, and in which, fortunately for himself, his companion did wait.

From this point I take the narrative in the language of Irwin, the deceased's companion: "When we come to the track, we noticed a train coming. Q. That is, to the main track? A. Yes, sir; and it was pretty close before we seen it; and Mr. Aiken attempted to go on, and I stopped. I said: 'We had better stop'; and he says, 'Come on; we can get across'; and he started, and I stopped. I had attempted to get across, and by the time I was at the track I could lay my hand on the engine." None of these facts were in the slightest doubt; for the evidence was in behalf of the plaintiff, and was that of the only witness who saw the accident. It is therefore indisputable that the deceased saw the train while he was in a place of safety, and voluntarily took the chances of crossing in front of it. In the face of this patent fact, the other circumstances — the danger of the place, the rate of speed of the train, the absence of warning, the obstructions to sight and hearing, etc. — became totally unimportant, and the plaintiff should have been nonsuited, or a verdict directed against her.

The learned counsel for the defendant in error has endeavored to assimilate this case to *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 59; but there is a marked and insuperable line of distinction between them. That was said by our brother Sterrett, in his opinion, to be a close case; but in laying down the rule that a man in a position of danger is not responsible for a mistake of judgment in getting out, he was careful to add the explicit qualification that he must have got into the danger without negligence or fault of his own. Keeping this qualification in mind, that case was the logical sequence of *Johnson v. West Chester etc. R. R. Co.*, 70 Pa. St. 357. But in the

present case the essential premise is wanting. Aiken not only walked into the dangerous position without any of the precautions which the situation required, but when confronted with the actual emergency, had his attention called by his companion to the danger imminent, and his reply, "Come on; we can get across," does not indicate a man who was confused, and in doubt what to do, but one who saw the risk, and chose to encounter it.

In the portion of the charge contained in the fifth specification of error, the learned judge said to the jury that, "ordinarily, the rule of law is, . . . that a man, before crossing a railroad track, must stop, look, and listen. . . . I think that it is usually applied, however, to parties who are driving, and not to parties walking. It is, after all, not a rule of law, but a rule of evidence only; and therefore the duty of stopping is always a question for the jury." This was clear error. The rule as to stopping applies equally to persons walking as to persons driving. There is no distinction, in the nature of things, except of degree as to danger, and none is recognized in the cases: *Nagle v. Allegheny V. R. R. Co.*, 88 Pa. St. 35; 32 Am. Rep. 413; *Carroll v. Railroad Co.*, 12 Week. Not. Cas. 348; *Pennsylvania R. R. Co. v. Coon*, 111 Pa. St. 430; *Marland v. Pittsburgh etc. R. R. Co.*, 123 Pa. St. 487; 10 Am. St. Rep. 541. It is made quite as much for the safety and protection of passengers on the train as of passengers on the highway; and the stopping is an essential part of the rule, to enforce attention to the accompanying duties of looking and listening, and to secure their performance in something more than a perfunctory and heedless way; in fact, to prevent the very thing which cost this unfortunate man his life. Irwin was asked: "Could you hear the train until you got past these obstructions? A. Possibly we might have, if we had been paying particular attention. We were talking, and I did n't notice." It is not a rule of evidence, but a rule of law, peremptory, absolute, and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions. That failure to stop is not merely evidence of negligence, but negligence *per se*, has been said so often, from *North Pennsylvania R. R. Co. v. Heileman*, 49 Pa. St. 60, 88 Am. Dec. 482, to *Greenwood v. Philadelphia etc. R. R. Co.*, 124 Pa. St. 572, 10 Am. St. Rep. 614, that to cite the cases would be wearisome.

The evidence in the sixth assignment, relative to the speed at which trains usually ran over this crossing, was irrelevant,

and tended to divert the attention of the jury from the particular case to the general condition of danger at this crossing. This objection was not obviated by the testimony of Irwin, that he thought the train was going "about the usual rate of speed."

The assignments of error must be sustained.

Judgment reversed.

RAILROADS—DUTY OF PERSONS ABOUT TO CROSS TRACK.—Ordinary prudence must be exercised by persons approaching railway crossings; they must stop, and look, and listen: *Note to Dyson v. New York etc. R. R. Co.*, 14 Am. St. Rep. 87; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514; 15 Am. St. Rep. 733, and note.

CONTRIBUTORY NEGLIGENCE.—Instances of what constitutes contributory negligence: *Note to Louisville etc. R. R. Co. v. Hall*, 13 Am. St. Rep. 94.

NEGLECTENCE.—ACTS OF ONE SURPRISED BY SUDDEN DANGER.—The law does not require that a person who is surprised and confused by a sudden danger should act or be judged by any fixed rule: *Pennsylvania Co. v. Stegmeler*, 118 Ind. 305; 10 Am. St. Rep. 136, and note. But if danger is known, and may be easily avoided, peril voluntarily and unnecessarily assumed may constitute such contributory negligence as to preclude recovery: *Harris v. Township of Clinton*, 64 Mich. 447; 8 Am. St. Rep. 842, and note.

PATTERSON v. MARINE NATIONAL BANK.

[130 PENNSYLVANIA STATE, 412.]

BANKS AND BANKING—DEPOSIT AS AGENT.—Where money is deposited in a bank by a person as agent, with nothing upon the face of the deposit account to show for whom he is agent, the money, as between the bank and the depositor, is the property of the latter.

BANKS AND BANKING—DEPOSIT—ESTOPPEL.—A bank which has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, is estopped from alleging that the money deposited belonged to some one else.

BANKS AND BANKING—RIGHTS OF DEPOSITOR—BURDEN OF PROOF.—Where money is deposited in bank by a person as agent, without anything on the face of the deposit account to show for whom he is agent, if the bank refuses to honor his check drawn against such fund, and pays the money to a third person, it does so at its peril, and must assume the burden of proof to show, not only that the money did not belong to the depositor, but also that it did belong to the party to whom the bank paid it.

BANKS AND BANKING—DAMAGES FOR REFUSAL TO HONOR CHECK.—The refusal of a bank to honor a depositor's check, without legal excuse, entitles him to recover substantial damages, without proof of pecuniary loss.

ASSUMPSIT in the case numbered 148 to recover a balance alleged to be due plaintiff, T. H. B. Patterson, upon a deposit

account opened by him with the defendant bank. Case in the action numbered 149, by plaintiff, to recover damages of said bank for a refusal to honor his check drawn against his said account. In July, 1886, plaintiff opened an account with the defendant bank in the name of "T. H. B. Patterson, agent," and between that time and October 5, 1887, made numerous deposits upon that account, and drew various checks against the same. On said October 5, 1887, his pass-book was balanced by the bank, and returned to him, showing a balance on deposit in his favor of \$1,315.53. No further deposits were made or checks drawn against this account until December 29, 1887, when plaintiff drew a check against the bank for the balance of his account. On presentation, payment of this check was refused. This money was claimed by, and paid by the bank to, T. N. and J. N. Patterson and C. F. and E. H. Hazeltine, who claimed that plaintiff made the deposit as their agent representing them in the estate of one Patterson, deceased. The other facts are stated in the opinion, except that the seventh and eighth assignments of error mentioned therein relate to the refusal of the court to grant the defendant the closing address to the jury, and the submission of the case to the jury. Verdict and judgment in the appeal numbered 148 in favor of plaintiff for \$1,404.55, and in the appeal numbered 149, for \$300. Defendant appeals.

S. Schoyer, Jr., and S. B. Schoyer, for the appellant.

J. S. Ferguson, for the appellee.

No. 148.

PAXSON, C. J. The money in controversy was deposited in the defendant bank by the plaintiff as "agent." There was nothing upon the face of the deposit to show for whom he was agent. In *Citizens' Nat. Bank v. Alexander*, 120 Pa. St. 476, the deposit was made by "W. J. Alexander, deputy treasurer," and we held that "the most effect that could be claimed for the words 'deputy treasurer' was an acknowledgment by Alexander that he held the money for some one else, and the other person not being designated, as between the bank and Alexander, the money belonged to Alexander." This followed directly the ruling in *First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632, where it was said: "It is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon its books, and thereby

entered into an implied contract to enter his check, to allege that the money deposited belonged to some one else. This may be done by an attaching creditor, or by the true owner of the fund, but the bank is estopped by its own act."

In the case in hand, the money was claimed by Joseph N. Patterson and others, who alleged that the plaintiff was their agent; that he had opened this account as "agent" in pursuance of an arrangement or agreement between the plaintiff and themselves; that this arrangement was known to the defendant bank, and that they had given the latter notice not to honor plaintiff's check. The existence of this arrangement and the true ownership of the money were among the controverted questions in the case, and the jury have found them both against the defendant. It further appears that the bank not only refused to honor plaintiff's check, but also paid the money out to the claimants upon the fund. It is to be presumed that it was indemnified for so unusual a proceeding.

A number of errors have been assigned to the charge of the court and the answers to points, but they are all without merit. It requires neither argument nor authority to show that when a bank refuses the check of its depositor, drawn against funds, and pays the money over to a third party, it does so at its peril, and must assume the burden of proof to show, "not only that the money in question did not belong to the plaintiff, but also that it did belong to the parties to whom the bank paid it": See first assignment. In the answers to points, and the portions of charge embraced in the second, third, fourth, and fifth assignments, the learned judge fairly submitted to the jury the question of the ownership of the money. This certainly was all the defendant could claim. The sixth and seventh assignments are void of merit. The last assignment does not conform to the rule of court, and will not be discussed further than to say that by the introduction of the evidence referred to, the plaintiff assumed the burden of showing that the money in bank did not belong to the parties claiming it, which he need not have done.

Judgment affirmed.

No. 149.

PAXSON, C. J. This case is an outgrowth of *Patterson v. Marine Nat. Bank*, just decided. When the defendant bank refused to honor the plaintiff's check, he brought suit against it for such refusal, resulting in a verdict in his favor for three hundred dollars. It follows logically that if the bank re-

1. refused to honor plaintiff's check without legal cause, he is en-
2. titled to recover damages for such refusal. The question of
3. the damages is the only one we need refer to.

4. The learned judge charged the jury, in answer to plaintiff's
5. points, that the plaintiff was entitled to recover substantial
6. damages, and that they might find punitive damages "if,
7. under all the circumstances of the case, the defendant unne-
8. cessarily and unreasonably acted in disregard of the rights of
9. the plaintiff, and with partiality against him." On the other
10. hand, the defendant prayed for the instruction "that the mere
11. loss of credit by the plaintiff is not a ground for damages,
12. unless it be immediately connected with some tangible pecuni-
13. ary loss of which it was the cause"; and *Eckel v. Murphey*,
14. 15 Pa. St. 488, 53 Am. Dec. 607, was cited in support of this
15. view. The court declined to so charge, and we think very
16. properly.

17. *Eckel v. Murphey*, 15 Pa. St. 488, 53 Am. Dec. 607, has no
18. application. That was a suit brought upon a promissory
19. note, and the defense set up was, that it was given in pursuance
20. of a contract for the sale of all plaintiff's red-ash coal mined
21. that season at Fremont; that the plaintiff had violated the
22. said contract in not delivering the coal in good order, and had
23. refused to deliver all the coal he had agreed to deliver, by
24. means of which the defendant suffered more damage than the
25. amount of said note. In such case, this court very properly
26. held that "the mere loss of credit by the drawer on account
27. of such failure of performance is not a ground of defense un-
28. less it be immediately connected with some tangible pecuniary
29. loss of which it was the cause." This language was quoted
30. in the defendant's point referred to, and while it is perfectly
31. good law, it has no application to the case we are considering.

32. A bank is an institution of a *quasi* public character. It is
33. chartered by the government for the purpose, *inter alia*, of
34. holding and safely keeping the moneys of individuals and cor-
35. porations. It receives such moneys upon an implied contract
36. to pay the depositor's checks upon demand. Individual and
37. corporate business could hardly exist for a day without bank-
38. ing facilities. At the same time, the business of the com-
39. munity would be at the mercy of banks if they could at their
40. pleasure refuse to honor their depositor's checks, and then
41. claim that such action was the mere breach of an ordinary
42. contract for which only nominal damages could be recovered,
43. unless special damages were proved. There is something more

than a breach of contract in such cases; there is a question of public policy involved, as was said in *First Nat. Bank v. Mason*, 95 Pa. St. 113; 40 Am. Rep. 632; and a breach of the implied contract between the bank and its depositor entitles the latter to recover substantial damages. In this case the jury do not appear to have given more; they evidently did not award punitive damages.

Judgment affirmed.

BANKS AND BANKING. — Money deposited by an agent in his own name, not for his principal, belongs to the agent, as between such agent and the bank: *Wood v. Boylston Nat. Bank*, 129 Mass. 358; 37 Am. Rep. 366.

BANKS AND BANKING — ESTOPPEL. — A bank that has received money from a depositor, and credited him upon its books, is estopped to deny the depositor's right and title to the money: *First Nat. Bank v. Mason*, 95 Pa. St. 113; 40 Am. Rep. 632.

BANKS AND BANKING. — RIGHTS AND REMEDIES of depositors: Note to *Levee Franklin Bank*, 19 Am. Dec. 418-431.

KRAMER v. WINSLOW.

[120 PENNSYLVANIA STATE, 434]

PRINCIPAL AND AGENT. — Where an agent, with authority in writing to sell land for a certain price, agrees with a third person to sell it to him for a greatly enhanced price, but concealing this fact from his principal, obtains the latter's title for the price for which he agreed to sell for him, and then sells to the third party for the price agreed upon between them, he is liable to his principal for the difference in price between the amount paid him for his title and the amount for which the sale was made.

ASSUMPSIT to recover a balance in the hands of defendant as agent for the sale of certain lands. Verdict and judgment for defendant, and plaintiff appeals.

H. C. Campbell and A. C. White, for the appellant.

Charles Corbet and John E. Calderwood, for the appellee.

GREEN, J. It was entirely undisputed that Kramer and Winslow, with two others, were tenants in common of the land in question, each having a one-fourth interest. It was established, by the testimony of the defendant himself, that, prior to the execution of the paper of January 24, 1880, he had been negotiating with Eastern parties for the sale of the land, and had actually made a contract with the Sandy Lick Gas Coal and Coke Company, or its representatives, for the sale of the property, for a consideration named therein, which was known to

him; that at the time he obtained the paper of January 24, 1880, he did not tell Kramer what he was to get for the land, and that he never told him, or gave him any information on the subject, but that he did say to Kramer the land would not be sold for less than thirty thousand dollars. In actual fact, Winslow had contracted to sell the land before January 24, 1880, to the coal and gas company, for \$44,497.50. But before he made that contract he had accepted from the plaintiff an agreement authorizing him, Winslow, to sell the plaintiff's interest, being the undivided one-fourth interest, in the land, for the consideration of seven thousand five hundred dollars, with authority, also, to have execution issued against Kramer on a certain judgment, and the interest of Kramer sold by the sheriff, so as to perfect the title. There was an added provision, that if Winslow failed to make the sale before February court, 1880, the execution was to be stayed. This agreement was made in December, 1879. The precise date does not appear, but it was testified to be about the middle of December. After this, and before January 24, 1880, Winslow made the contract for the sale of the whole tract for \$44,497.50, and after that he obtained from the plaintiff the paper of January 24, 1880. There is no occasion to go any further with the statement of facts than this.

That the agency of the defendant for the plaintiff in making the sale was perfectly established by the paper of December, 1879, is not open to a moment's question. That the sale was made by the agent while that agreement was in force is proved by the defendant's own personal testimony. That he withheld from the plaintiff all knowledge, both of the fact of the sale and the amount of the consideration, is actually narrated by the defendant as a witness on the stand, and apparently as if he thought such conduct lawful and honest. Having this knowledge, he induced the plaintiff to execute the agreement of January 24, 1880. In that agreement, after reciting what was false, to wit, that he was still negotiating with Eastern parties for the sale of the land, when, by his own testimony, it is proved that the negotiation had already been closed, and suppressing what was true, to wit, the fact that he had already sold the land for nearly forty-five thousand dollars, he induces the plaintiff to agree that he, the defendant, may have the plaintiff's interest in the land sold at sheriff's sale, and may buy it himself at a sum not exceeding three thousand dollars, and after the sheriff's sale, that he, the plaintiff, will execute

a quitclaim deed to the defendant for seven thousand five hundred dollars, the whole of which was to be paid out of the proceeds of the sale to the Eastern purchasers. As if to add to the iniquity of the transaction, a clause is inserted in the agreement, at the end, but above the signatures, in these words: "If sale is not made as aforesaid, this agreement to be null and void." The effect of this was, that Winslow was not to be bound in any event by anything but an actual, closed, completed sale to others; and therefore the instrument of January 24, 1880, could not possibly be regarded as an absolute deed, sealed and delivered, passing the title by its own force; but Kramer was bound to convey by quitclaim to Winslow, if he required it, for seven thousand five hundred dollars, his, Kramer's, title, which he, Winslow, Kramer's own agent to make the sale, and also his co-tenant, had already contracted to sell to others for over eleven thousand dollars.

Lest we may be considered as having misunderstood or overstated the evidence, we quote from the testimony of Winslow, as follows: "Q. At the time that you obtained this second contract, you had made your preliminary contract for the sale of the land? A. I stated that before. Q. And you knew what you were getting for it? A. I knew what I was getting for it; yes, sir. Q. You did not tell George Kramer what you were selling that land for, when you got that second writing, did you? A. I did not, sir; never told him. Q. You never gave him any information as to what it was being sold for? A. I never did, sir." There was more testimony of the same sort, from the same witness, but this is enough. The sale by the sheriff was had under a writ of execution issued by a law firm, of which Winslow was a member. Kramer's interest was sold to one Wilson by arrangement with Winslow, whereupon Wilson conveyed the interest to Winslow, who then conveyed to the real purchasers; and the proceedings were carried on with so much expedition that although the second agreement between Kramer and Winslow was made on January 24, 1880, the final deed from Winslow to the Sandy Lick Gas Coal and Coke Company was executed on February 16, 1880, just twenty-three days later. On the same day, the purchaser gave a mortgage to Winslow for \$29,665, part of the \$44,497.50, purchase-money of the whole tract.

In the court below, the case was totally misconceived and mistried. It was disposed of on the theory that the agreement for the agency to make the sale was merged in the paper

of January 24, 1880, which the court held to be an absolute deed in fee-simple, and that the question was, whether this deed could be changed by parol. The learned court utterly failed to submit even that question to the jury, or in fact any question. In the charge, the court told the jury what the plaintiff's testimony was, and what the defendant's testimony was, and then, without telling them what question arose, or that any question arose, for their decision, answered the point on both sides; and these answers, so far from presenting any distinct question of fact to the jury for their decision, practically took away from them the consideration of any question whatever.

Thus the court affirmed the defendant's third point, which was: "That, under the evidence, the writing exhibit A was superseded by or merged into the agreement of January 24, 1880." This disposed of the original agreement of December, 1879, creating Winslow's agency to make the sale for Kramer. Next, the defendant's fourth point was affirmed, which was: "That as the evidence in this case shows an agreement in writing between the parties for the sale and purchase of the interest of the plaintiff in the land, the parties are bound thereby, in the absence of competent evidence to contradict or vary the writing." This may mean that the parties are bound by the contract, because there was an absence of competent evidence to contradict, or it may mean that they would be bound if there was an absence of competent evidence to contradict; and this very uncertainty was a conclusive reason why the point should have been either refused or qualified. But to remove all doubt, the defendant's fifth point was also affirmed, which was: "That as the evidence on behalf of the plaintiff to contradict or vary the agreement consists of the plaintiff's unsupported oath, which was contradicted by the defendant's oath and the persuasive evidence furnished by the agreement, such evidence on the part of the plaintiff is not sufficient to establish such contradiction or variance, and the agreement must be taken as the contract of the parties." This was a binding instruction to the jury that all the plaintiff's testimony was insufficient to vary the deed or agreement of January 24, 1880, and consistency required that the jury should have been directed to find a verdict for the defendant, but the court refused to do this, by refusing the defendant's sixth, seventh, and eighth points. Nevertheless, the court did

not explain anywhere, either in the charge or answers, that there was any question of any kind for them to dispose of.

But what makes the whole matter so very much worse even than this is, that the court refused the plaintiff's seventh point, which did ask to commit to the jury the whole effect of the defendant's acts and omissions upon his liability to account, for the reason that "this contract of January 24, 1880, was an absolute sale of the interest"; and yet they affirmed the plaintiff's fifth point, which presented substantially the same facts as the seventh, "if the jury believe, from a preponderance of all the evidence, that the contract of January 24, 1880, was changed to conform to what is alleged by the plaintiff in this point." At the same time, the court affirmed, without qualification, the plaintiff's sixth point, which simply asked to commit to the jury the whole of the facts set up by the plaintiff as evidence of fraud by the defendant which would justify a verdict against the defendant for the amount of the difference between the sum received by him and the sum paid to the plaintiff. In other words, the jury might find for the plaintiff, under the answer to the plaintiff's fifth and sixth points, if they found that the contract of January 24, 1880, was changed by parol, in accordance with the plaintiff's allegations, but under the answer to the plaintiff's seventh point, they could not so find, because the contract of January 24, 1880, was an absolute sale of the plaintiff's interest. And under the answer to the defendant's fifth point, they were absolutely directed that all the plaintiff's testimony, taken together, was insufficient to change that contract. Nevertheless, when asked by the defendant to charge that the evidence was insufficient to change the contract, such instruction was refused, and the jury were told that all the evidence was for them. What the jury were to do under such a state of the charge and answers is simply impossible for us to understand, and that being so, we are bound to hold that the charge and answers were confused, uncertain, and misleading.

The whole difficulty grew out of the misapprehension by the learned court of the true character of the case, and of the question involved. There was no question of merger of the original agreement or letter of attorney, authorizing Winslow to sell the plaintiff's interest in the land, into the contract of January 24, 1880. There was no question of altering, contradicting, or changing the contract of January 24, 1880, nor of setting it aside as void for fraud. That paper had done its

work completely, and other rights had intervened. Under it, the plaintiff's interest in the land was sold at sheriff's sale to Wilson, who conveyed at once to Winslow, who in turn conveyed to the Sandy Lick Gas Coal and Coke Company, for a full and valuable consideration, the whole of the tract, including the plaintiff's interest. These purchasers were innocent purchasers for valuable consideration actually paid, and without notice of any fraud. Of course, their title cannot be affected, and there is not, and cannot be, any question in the case of setting aside, changing, or altering the contract of January 24, 1880. It cannot be done, and was not asked to be done, by the plaintiff, and he repeatedly called the attention of the court below in his points to what was the real question in the case, to wit: How much was the defendant bound to account for to the plaintiff by reason of the facts that he had undertaken to sell, and had sold, the plaintiff's interest in the land, and had not accounted to the plaintiff for the whole amount received? Did the defendant accept the agency for the sale? Did he sell the interest while the agency continued? How much did he sell the interest for? How much did he pay to the plaintiff? For the difference, if there was any, he was liable to account to the plaintiff in this action. It was an action of *assumpsit* to recover that very difference, and for nothing else. The plaintiff's case was made out by the defendant's personal testimony. He did accept the agency to sell; he did sell. After that, and without informing his principal, either that he had sold, or of the amount at which he sold, he obtained from him the contract of January 24, 1880, which has, in a contorted form only, but not in substance, the effect of an absolute conveyance. But when that paper was obtained, and if it had been of the most absolute character as a conveyance, it would not have reduced by a hair's-breadth the terms or the extent of Winslow's liability to Kramer in this action. No question of that kind could have arisen, unless Winslow had proven very clearly indeed that before obtaining that paper he had informed Kramer very fully, and with perfect truthfulness, of the fact that he had contracted for the sale, of the parties to whom he had sold, and of the precise amount for which he had sold. If, after that, Kramer had chosen to make the contract of January 24, 1880, he would be bound by it; but without such knowledge on his part, that paper would be no more than a puff of air in the way of his recovery.

The defendant's own testimony established his own liability beyond all question, and the jury should have been so instructed. Whether he was entitled to any abatement of the full amount of the difference between the sum he paid Kramer and the amount received would depend upon the character of the allowances claimed, and also upon the question whether he was guilty of fraud in fact. If he was, he would be entitled to no deductions; but we express no opinion upon these matters, because they are not before us. We sustain the second, fourth, fifth, eighth, ninth, tenth, eleventh, twelfth, and thirteenth assignments of error, and on them the judgment is reversed.

Judgment reversed, and new *venire* awarded.

REAL ESTATE AGENTS — SALES OF LAND. — Authority to sell land imposes upon an agent the duty of accounting to the principal for the highest price attainable: *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.

UNEXCELLED FIRE-WORKS COMPANY v. POLITES.

[130 PENNSYLVANIA STATE, 536.]

SALES — REPUDIATION — DAMAGES FOR NON-PERFORMANCE OF CONTRACT. —

Where goods are ordered under a simple bargain and sale, and notice is given by the buyer to the seller not to ship them, in advance of delivery, and before they were separated from the bulk, and set apart to the buyer, such notice is not only a repudiation of the contract of sale, but also a revocation of the carrier's agency to receive them; and the refusal of the buyer to receive the goods when delivery is tendered by the carrier does not make him liable for their contract price, but only for special damages for the refusal to receive them.

SALES — MEASURE OF DAMAGES FOR BREACH OF EXECUTORY CONTRACT. —

When the seller stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages for a breach of the contract of sale; but in the case of an executory contract for the sale of goods not specific, the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery.

W. H. Falls, for the appellants.

D. Jameson, and G. E. Treadwell, for the appellee.

CLARK, J. This is an action of *assumpsit*, brought July 20, 1888, to recover the price of a certain lot of fire-works and celebration goods, ordered by the defendant, George Polites, from the Unexcelled Fire-works Company, of New York, in

February, 1888. The first order, which was for his store in Newcastle, was given through the plaintiffs' agent, Alexander Morrison, and amounted to \$208.53; the second, sent directly to the plaintiffs, was for the defendant's store in Washington, Pennsylvania, and amounted to \$123.83. These orders were in writing, and were signed by defendant; they specified, not only the particular kind and quality of the articles ordered, but contained, also, a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the tenth day of July thereafter. Upon receipt of these orders, the plaintiffs transmitted by letter a formal acceptance of them; a contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On April 5, 1888, the defendant, by letter, informed the plaintiffs that he did not want the goods, and notified the plaintiffs not to ship them, as he could do better with another company. The plaintiffs replied that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement.

The goods were shipped within the time agreed upon, — the first lot to Newcastle, and the second lot to Washington, according to contract; but on their arrival the defendant declined to receive them. The carrier notified the shippers that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession; the plaintiffs thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiffs allege that they are manufacturers and importers of such fire-works as are used in the Fourth of July celebrations throughout the country; that it is not profitable to carry these goods over from one season to another, and that therefore the quantity manufactured and imported depends upon the extent of the orders received; that the defendant's orders entered into their estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiffs' agent, informed him, at the time he gave the first order, that the plaintiffs had some, at least, of the articles in stock, and that he did not order any either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of

goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case.

It is plain that the notice given to the plaintiffs by the defendant not to ship the goods was a repudiation of the contract; it was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant; the direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiffs made the carrier their agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered. We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evidence given of the market value of the goods, as compared with the price. It does not appear that the plaintiffs had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market.

Whilst the manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific, the rule undoubtedly is, that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery.

Judgment affirmed.

SALES — BREACH OF CONTRACT OF SALE — MEASURE OF DAMAGES. — The proper measure of damages on the breach of a contract of sale of goods is the difference between the contract price and the price at the time and place of delivery: *Cohen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203; *Pittsburgh etc. Ry Co. v. Heck*, 50 Ind. 303; 19 Am. Rep. 713; *Rider v. Kelley*, 32 Vt. 268; 76 Am. Dec. 176; *Clements v. Beatty*, 87 Ala. 238; *Deutch v. Pratt*, 149 Mass. 415; *Dennis v. Leaton*, 72 Mich. 586; *Eastern Ice Co. v. King*, 86 Va. 97.

COLLINS v. CHARTIERS VALLEY GAS COMPANY.

[131 PENNSYLVANIA STATE, 143.]

WATERS — RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS. — The distinction between rights in surface and in subterranean streams is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or acquirable, of their existence, location, and course. The rule of *damnum absque injuria* applies in either case only in the absence of negligence.

WATERS — RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS. — The use to which a subterranean stream may be lawfully put, if it inflicts damage on surrounding streams or lands, must be natural, proper, free from negligence, and the damage inflicted unavoidable, and not sufficiently obvious to have been foreseen, and prevented by reasonable care and expenditure.

WATERS — RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS. — If a land-owner, in drilling an oil or gas well, has knowledge of the existence of a stratum of clear water underneath his land, and its flow into wells and springs in the vicinity, and of the existence of a deeper stratum of salt water, which is likely to rise and mingle with the fresh when penetrated by the drill, his failure to use available means to prevent such mingling, by a reasonable expense, is negligence, for which he is liable to the owner of such wells or springs.

TRESPASS to recover damages for an injury to a water-well. Plaintiff is the owner of a parcel of land on which is situated a well used to supply water for domestic purposes. Defendant engaged a contractor to drill a well for natural gas on an adjoining lot, and after its completion accepted it, and remained in possession to the time of trial. In boring the well, at a depth of about seventy feet it passed through a vein of fresh water, which supplied plaintiff's well, and at a depth of about seven hundred feet it passed through a vein of salt water, which rose, and, mingling with the fresh water, ruined plaintiff's well, and the use of the water therein. There was evidence that defendant should have known that its well would tap the salt water, and thus injuriously affect surrounding water-wells, and that this could have been prevented at an expense of from fifty to two hundred and fifty dollars in properly casing the well. Defendant, though notified of the injurious effect of the salt water upon plaintiff's water-well, failed to remedy the matter. Verdict and judgment for defendant, and plaintiff appealed.

James S. Young and S. U. Trent, for the appellant.

James C. Doty and John M. Kennedy, for the appellee.

MITCHELL, J. The dividing line between the right to use one's own, and the duty not to injure another's, is one of great

nicety and importance, and frequently of difficulty. The Pennsylvania decisions have endeavored, with unusual care, to preserve the substance of both rights, as far as their sometimes inevitable conflict may permit.

With regard to the use and control of flowing water, and of watercourses, the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, definitely settled the rule that for unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained. No other result seems possible, without restricting the uses, derogating from the full enjoyment, and diminishing the value of property. But the rule does not go beyond proper use and unavoidable damage. It is thus clearly expressed in the opinion of our brother Clark: "Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*": 113 Pa. St. 146. That this is the rule as to surface streams was conceded by the defendant below; but it contended that as to subterranean waters, or at least as to percolations and hidden streams, an owner was not bound to pay any attention to the effect of his operations within his own land upon the land of others. The learned judge below, though seeing and expressing the force of the reasons for a uniform rule applicable to both classes of waters, felt himself so far constrained by adjudicated cases that he directed a verdict for the defendant. We have therefore to examine the cases, to see what the true distinction is between surface, or visible, and subterranean waters, and whether different principles are applicable to the rights in them, respectively, or the same principle, with only such modifications as may be necessary in practical application.

In *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, the plaintiff had a spring upon his property, which he had used in his tannery for more than twenty-one years, when defendant opened a mine on his adjacent land, and put in a steam-pump to take out the water, with the result of drying up the plaintiff's spring. It was held that plaintiff had no cause of action. This case settled the law on the subject of percolating waters, and has not since been questioned. It was followed in *Halde-man v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511, but was restated rather narrowly, by Justice Strong, thus: "In that

case, it was ruled that where a spring depends for its supply upon filtrations or percolations of water through the land of an owner above, and in the use of the land for mining, or other lawful purposes, the spring is destroyed, such owner is not liable for the damages thus caused to the proprietors of the spring, unless the injury was occasioned by malice or negligence. To such percolations or filtrations, then, the inferior owner has no right. This was all that was necessary to the decision of the case." He then criticises the rest of the opinion in *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, as *dictum*, and formulates the rule again in the following terms: "A proprietor of land may, in the proper use of his land for mining, quarrying, building, draining, or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor." These forcible statements of the rule are, as I apprehend, the main ground of the contention on behalf of the defendant in the present case, that an owner is not bound to pay any regard to the effect of his operations on subterranean waters. But this contention overlooks the qualification made in all the cases, that there must be no negligence. The opinion of Chief Justice Lewis in *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, is as able, elaborate, and convincing a discussion of the subject as can be found reported, and in it the necessary and unavoidable character of the damage is explicitly insisted on: "When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it and to avoid diverting it, without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land": Page 532. "The owner of a spring, although his right is imperfect where the supply is derived through his neighbor's land, has nevertheless a privilege subordinate only to the paramount rights of such neighbor; and it is only when the fair enjoyment of those paramount rights requires its destruction that he is bound to submit to the deprivation": Page 535. And even in *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511, which is the most strongly expressed of all the decisions in favor of the rights of the proprietor on his own land, it is clear that the same qualification is not lost sight of, although not prominently put forward. "A surface stream,"

says Strong, J., "cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself nor that other can have any knowledge. . . . These appear to us very sufficient reasons for distinguishing between surface and subterranean streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoining's land. They are as applicable to unknown subsurface streams as they are to filtrations and percolations through small interstices." And in *Lybe's Appeal*, 106 Pa. St. 634, 51 Am. Rep. 542, it is said: "The rule is, that, wherever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor." On the other hand, where the subterranean water is not hidden, but has a defined flow, which is known or ascertainable, rights in it will be treated on the same basis as rights in a surface stream: *Whetstone v. Bowser*, 29 Pa. St. 59.

It is therefore clear, from the principles and the reasoning of all the cases, that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course. The principle of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, is precisely the same as that of *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, and is of general application. It is, that the use which inflicts the damage must be natural, proper, and free from negligence, and the damage unavoidable. On the question of negligence, the question of knowledge is always important, and may be conclusive. Hence the practical inquiry is: 1. Whether the damage was necessary and unavoidable; 2. If not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure? In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, the damage was unavoidable. In *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, it was not ascertainable beforehand; hence the plaintiff had no cause of action in either case. Later cases, following *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721, have held that injury to springs, wells, etc., supplied by mere

percolation, was not actionable, and the reason has always been the same, that the damage could not be foreseen or avoided. If the boundaries of knowledge have been so enlarged as to make an end of the reason, then, *cessante ratione, cessat ipsa lex*. Geology is a progressive, and now in many respects a practical, science; and as truly remarked by the learned judge below, in his opinion on the motion for a new trial, "since the decisions in *Acton v. Blundell*, and *Wheatley v. Baugh*, probably more deep wells have been drilled in western Pennsylvania than had previously been dug in the entire earth in all time. And that which was then held to be necessarily unknown, and merely speculative, as to the flow of water underground, has been, by experience in such cases as this, reduced almost to a certainty." If this is the state of knowledge at the present day,—if the existence of a stratum of clear water, and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water which is likely to rise and mingle with the fresh, when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense,—then, clearly, it would be a violation of the living spirit of the law not to recognize the change, and apply the settled and immutable principles of right to the altered conditions of fact. The learned judge, in his charge, said: "There is evidence from which the jury could fairly find that the defendant, when the well was drilled, knew, or ought to have known, if they had exercised any reasonable judgment, or investigated or paid attention to it, that the boring of this well in the way it was done, without shutting off the salt water from the fresh water, would almost inevitably ruin these and other wells in the immediate vicinity. And I think there is evidence from which the jury could fairly find that the defendant could, with the outlay of a small amount of money, have shut off the salt water from the fresh water so that it could not have done any injury." If the jury had found the facts as this charge assumes that they fairly might on the evidence, then the plaintiff had made out a case of negligence, and was entitled to recover. Negligence in this sense is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation. If the plaintiff showed that the injury was plainly to be anticipated, and easily preventable with reasonable care and expense, he brought himself within the exception of all the cases from *Wheatley v.*

Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, to *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, inclusive.

It may be well to say that in cases of this nature juries should be held with a firm hand to real cases of negligence within the exception, and not allowed to pare down the general rule by sympathetic verdicts in cases of loss or hardship from the proper exercise of clear rights. The danger of such result is not to be ignored, but we cannot on that account shut the door to suitors entitled to redress for genuine wrongs. The duty to maintain the line firmly where justice and law put it is, in the first instance, and chiefly, upon the trial courts.

Judgment reversed, and *venire de novo* awarded.

SUBTERRANEAN WATERS — RIPARIAN RIGHTS. — Subterranean waters, when they flow in clearly defined channels, are subject to the same rules of law that govern waters and riparian rights respecting watercourses above-ground; but this is not true if the subterranean waters do not flow in defined channels: Note to *Wheatley v. Baugh*, 64 Am. Dec. 727-730; *Burroughs v. Saterlee*, 67 Iowa, 396; 56 Am. Rep. 350. Draining a well or subterranean spring of another, caused by an excavation or hole drilled by one upon his own land, is *damnum absque injuria*, for which no action will lie: *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511, and note; *Chase v. Silverstone*, 62 Me. 175; 16 Am. Rep. 419; *Hougan v. Milwaukee etc. R. R. Co.*, 35 Iowa, 558; 14 Am. Rep. 502; *Village of Delhi v. Youmans*, 45 N. Y. 362; 6 Am. Rep. 100; but there must be no negligence or malice upon the part of the land-owner: *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511.

ESTATE OF GRIMM.

[121 PENNSYLVANIA STATE, 122.]

MARRIAGE — COHABITATION AND PROMISE OF MARRIAGE DOES NOT ESTABLISH. — The illicit cohabitation of a man and woman as husband and wife for one week prior to the death of the former under an agreement that the marriage ceremony was to be performed the next week, and the acknowledgment of the man that the woman was his wife, in the presence of witnesses, is not sufficient to constitute marriage.

MARRIAGE — PRESUMPTION — REBUTTAL. — The presumption of marriage arising from the illicit cohabitation and reputation of marriage between a man and woman is rebutted by evidence that no marriage ceremony has in fact taken place between them.

John R. Large, for the appellant.

A. J. Kirschner, for the appellee.

PAXSON, C. J. This case is peculiar. The appellant filed her petition in the court below, claiming to be the widow of

Gottfried Grimm, and asking that three hundred dollars' worth of property be appraised and set apart to her out of the estate of said decedent. The court below disallowed her claim.

The evidence upon which her claim to widowhood was based amounts to this: That the appellant and the deceased cohabited together as man and wife for one week prior to the death of the latter; that the marriage ceremony was to have been performed the following week, but that it was prevented by the sudden death of the decedent. The appellant was sworn and examined under objection, and her testimony was as follows: "I knew Gottfried Grimm since last Christmas. We lived together as man and wife a week before he died. The arrangement between us was, that everything that was his should be mine, and my children get three hundred dollars each. We cohabited as man and wife. He acknowledged me in presence of others as his wife. The ceremony was to be performed the next week after he died. He was to have everything fixed the next week, and we were to have been married the Tuesday after he was killed. He was to get the license. We lived together, and he treated me as a wife, from the time he came over."

In the face of this clear statement that no marriage had taken place, the mere fact that Mr. Grimm acknowledged her as his wife in the presence of witnesses has little significance. Neither cohabitation nor reputation of marriage is marriage. When conjoined, they are evidence from which a presumption of marriage arises: *Yardley's Estate*, 75 Pa. St. 207. "The presumption of marriage arising from such facts may always be rebutted, and wholly disappears in the face of proof that no marriage in fact had taken place. Again, the cohabitation was illicit at its commencement. It may not have been meretricious, so far as the appellee is concerned. There is evidence to show that she was deceived, but it was clearly illegal. The general rule is, that a relation shown to have been illicit at its commencement . . . raises no presumption of marriage": *Hunt's Appeal*, 86 Pa. St. 294. In the case in hand, the relation between these parties was illicit at its commencement, and known to be such by the parties. There was no marriage in law or in fact. They were to have been married the next week, according to the appellant's own testimony. That it was prevented by the death of Mr. Grimm, if the fact be so, was a misfortune to the appellant. It would have been better for her had the cohabitation been later, or the

marriage earlier. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

MARRIAGE — WHAT CONSTITUTES. — A contract to marry *per verba de futuro*, followed by cohabitation, notwithstanding some decisions to the contrary, seems by the weight of authority to be a valid marriage: Note to *Cheney v. Arnold*, 69 Am. Dec. 615-619; *Sharon v. Sharon*, 75 Cal. 1; *Sharon v. Sharon*, 79 Cal. 633. Marriage is not presumed from a sexual cohabitation originally illicit: *Appeal of Reading Fire Ins. Co.*, 113 Pa. St. 204; 57 Am. Rep. 448, and more particularly extended note 451-463, as to the rebuttal of the presumption of marriage from illicit intercourse. Compare also *Cartwright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105, and note 117, 118.

ESTATE OF KNOX.

[121 PENNSYLVANIA STATE, 220.]

WILL OF MARRIED WOMAN — SUFFICIENCY OF SIGNATURE. — A writing clearly testamentary in character, though wanting the form of a will, but admitted to be entirely in the handwriting of a deceased married woman, and attested at the end by the signature "Harriet," admitted to have been made by her, is valid as her will under the Pennsylvania statute of 1887 enabling married women to execute their will as if sole.

WILL OF MARRIED WOMAN — CONSTRUCTION — SUFFICIENCY OF SIGNATURE. — A writing in lead-pencil, made by a married woman, wanting the form of a will, and written in the form of a letter, signed "Harriet," and addressed to no one by name, but clearly intended for her mother, or such of her family as should assume control of her property after her death, requesting that certain property be given to persons named, admitted to be in her handwriting, and attested at the end by such signature, made by her in the form which she habitually used, is valid as her last will.

APPEAL by James A. Knox, husband of Harriet S. Knox, deceased, from a judgment affirming the decision of the register of wills admitting to probate as the last will and testament of Harriet S. Knox, deceased, an instrument, written with lead-pencil, upon three pages of ordinary letter-paper, as follows: "A few little things I would love to have done. Always keep Vicie and Pet, if possible. Mama to have everything she wants, with a few exceptions of remembrances. Please let sister have my house-rent as long as she may live; then may my little namesake have it. The money in Pittsburgh Savings Bank for Bessie; but just let it be until she is eighteen years old. Please send something I have painted to Miss Judkins, also to Lee. A box in attic I have fixed for Dollie Good; and please, mama, always remember her, and help her whenever you can. My diamond pin and largest stone-

ring and bracelets for mama. The next size stone in ring for Bessie; also locket and chain, and the next for Harriet; also auntie's locket, not to have until old enough to appreciate it. Please send seal sack to Lena Johns, and fur circular to Katie Good; my beaver set to Dollie Good. Give Jane my blue suit; also, please take one hundred dollars out of the rent of next quarter, October, and give her for a nest-egg, — she is so good, and loves Vicie. The one thousand dollars auntie left me, please give to Lee five hundred dollars, and sister five hundred dollars. My coral to Ella McKinney, and a plain gold ring to Dan. McK. Sewing-machine to sister, and have her take some money, get nice books, and give one to each one of my Sunday-school class of 1885, which I left when going to New Brighton. Please have just my baptismal names on stones, daughter of E. J. and Felician Slataper. Dr. Dunn would give you the list of names, about eleven or twelve girls. My large arm-chair to Dr. Strom. Take good care of Vicie, 'somebody,' as long as she lives. Saturday. **HARRIET.**"

R. D. Wilson and W. K. Jennings, for the appellant.

Charles M. Thorp and John H. Hampton, for the appellees.

MITCHELL, J. The writing in question is clearly testamentary. Although it does not, on its face, purport to be a will, and in form is not a command, but a request, addressed to no special person by name, but plainly to those who should have the possession or control of her property, it has the essential element of being a disposition of property, to take effect after death, and the precatory form is therefore immaterial: *Fosselman v. Elder*, 98 Pa. St. 159.

It being undisputed that the paper is in the handwriting of the decedent, and being testamentary in character, the only question left upon its validity as a will is the sufficiency of its execution by the signature "Harriet."

The paper is proved to have been written after the passage of the act of June 3, 1887 (P. L. 332), and the fact that the decedent was a married woman is therefore unimportant. That act repealed the requirement that a married woman's will should be executed in the presence of two witnesses, neither of whom should be her husband, and put her, in respect to signature by herself, upon the same footing as men and unmarried women. No greater effect can be attributed to the statute. It certainly was not intended to authorize a married woman to execute a will any more loosely than other

persons. We are therefore remitted to the general question whether a signature by the first name only may be a valid signing of a will under the act of 1833 and its supplements.

The condition of the law before the passage of the wills act of 1833 is well known. By the English statute of frauds, all wills as to land were required to be in writing, signed by the testator. Under this act, it was held that the signature of the testator in any part of the instrument was sufficient: 1 Redfield on Wills, c. 6, sec. 18, pl. 9, and cases there cited. The same construction was given to the law in Pennsylvania; and under the act of 1705 (1 Sm. L. 33), which required wills of land to be in writing, and proved by two or more credible witnesses, etc., it was even held that a writing in the hand of another, not signed by the testator at all, might be a good will: *Rohrer v. Stehman*, 1 Watts, 463. In this state of the law, the act of 1833 was passed. It was founded on the English statute of frauds (29 Car. II.), the phraseology of which it follows closely, but with the important addition that the will shall be signed "at the end thereof." In making this change, it is undoubtedly true, as suggested by Strong, J., in *Vernon v. Kirk*, 30 Pa. St. 222, that the legislature "looked less to the mode of the signature than to its place." Accordingly, the statute makes no definition of a signature, or of the word "signed." "It was only by judicial construction that . . . [the statute] was made to require . . . the testator's signature by his name": Strong, J., in *Vernon v. Kirk*, 30 Pa. St. 22; and that judicial construction which held that a mark was not a valid signature: *Asay v. Hoover*, 5 Pa. St. 21; 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. St. 441; 47 Am. Dec. 418, decided in 1846, — was changed, it may be noted, by the legislature as soon as their attention was directed to it: Act January 27, 1848, P. L. 16.

The purposes of the act of 1833 were, accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was obtained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute; the third was new (since followed by the act of 1 Vict. c. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for

the expression of final intention: *Baker's Appeal*, 107 Pa. St. 381; 52 Am. Rep. 478; *Vernon v. Kirk*, 30 Pa. St. 223. These being the purposes of the act, and the legislature not having concerned itself with what should be deemed a signing, we must look *dehors* the statute for a definition. As already said, the act is founded on the statute of frauds, 29 Car. II. Under that act it has been held that the signing may be by a mark, or by initials only, or by a fictitious or assumed name, or by a name different from that by which the testator is designated in the body of the will: 1 Jarman on Wills, *78; 1 Redfield on Wills, c. 6. sec. 18, and cases there cited. In this state, as already seen, it was held, on a narrow construction of the act of 1833, that a mark was not a signing; but on the other points, so far as they have arisen, our decisions have been in harmony with those of the English courts. Thus in *Long v. Zook*, 13 Pa. St. 400, the will of David Long was held to be validly executed by his mark, although the mark was put to the name of Jacob Long. In *Vernon v. Kirk*, 30 Pa. St. 218, "Ezekiel Norman, for Rachel Doherty, at her request," was held to be a valid signing under the act. And in *Main v. Ryder*, 84 Pa. St. 217, it may be noted that a mark was held to be a good signature (subsequent to the act of 1848), though put to a name which was not the testator's real, or at least his original, name, though it was one by which he had been known for some years in his own neighborhood. No question was raised against the will on this point.

The precise case of a signature by the first name only does not appear to have arisen either in England or in the United States; but the principles on which the decisions already referred to were based, especially those in regard to signing by initials only, are equally applicable to the present case, and additional force is given to them by the decisions as to what constitutes a binding signature to a contract under the same, or analogous statutes. Browne on the Statute of Frauds, section 362, states the rule thus: "In cases where the initials only of the party are signed, it is quite clear that, with the aid of parol evidence which is admitted to apply to them, the signature is to be held valid." And see *Palmer v. Stephens*, 1 Denio, 478; *Sanborn v. Flagler*, 9 Allen, 474; *Weston v. Myers*, 33 Ill. 432; *Salmon Falls Co. v. Goddard*, 14 How. 446; *Chichester v. Cobb*, 14 L. T., N. S., 433. Though, therefore, we find no precise precedent, yet the analogies are all favorable, rather than otherwise, to the sufficiency of a signing by first name only, if

it meets the other requirements of the act. These are matters depending on circumstances which will be considered further on. Looking beyond the decisions to the general use of language, what is understood by signing and signature? Webster defines to sign as "to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting"; and signature as "a sign, stamp, or mark impressed; . . . especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intentions; a sign-manual." All the definitions include a mark, and no dictionary limits a signature to a written name. There can be no doubt that, historically, and down to very modern times, the ordinary signature was the mark of a cross; and there is perhaps as little question that in the general diffusion of education at the present day the ordinary use of the word implies the written name. But this implication is not even yet necessary and universal. The man who cannot write is now happily an exception in our commonwealth, but he has not yet entirely disappeared, and in popular language he is still said to "sign," though he makes only his mark. Thus in *Asay v. Hoover*, 5 Pa. St. 26, 45 Am. Dec. 713, the witness says: "The name was written after the will was read to her, and after she had signed it. . . . She was reclining in bed when she signed it," although the signature the witness was testifying to was only a mark. But even in the now usual acceptance of a written name, signature still does not imply the whole name. Custom controls the rule of names, and so it does the rule of signatures. The title by which a man calls himself and is known in the community is his name, as in *Main v. Ryder*, 84 Pa. St. 217, whether it be the one he inherited or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. There is no requirement that it shall be legible, though legibility is one of the prime objects of writing. It is sufficient if it be such as he usually signs, and the signatures of neither Rufus Choate nor General Spinner could be rejected, though no man, unaided, could discover what the ragged marks made by either of those two eminent personages were intended to represent. Nor is there any fixed requirement how much of the full name shall be written. Custom varies with time and place, and habit with the whim of the individual. Sovereigns write only their first names, and the

sovereign of Spain, more royally still, signs his decrees only, "I, the King" (Yo, el Rey). English peers now sign their titles only, though they be geographical names, like Devon or Stafford, as broad as a county. The great Bacon wrote his name, Fr. Verulam, and the ordinary signature of the poet-philosopher of fishermen was Iz: Wa:. In the fifty-six signatures to the most solemn instrument of modern times, the Declaration of Independence, we find every variety, from Th. Jefferson to the unmistakably indented Charles Carroll of Carrollton. In the present day, it is not uncommon for business men to have a signature for checks and banking purposes somewhat different from that used in their ordinary business, and in familiar correspondence, signature by initials or nick-name or diminutive is probably the general practice:

What, therefore, shall constitute a sufficient signature must depend largely on the custom of the time and place, the habit of the individual, and the circumstances of each particular case. As already seen, the English and some American cases hold that a signature by initials only, or otherwise informal, and short of the full name, may be a valid execution of a will or a contract, if the intent to execute is apparent. To this requirement our statute adds that the signature must be at the end, as evidence that the intent is present, actual, and completed. On this point of the completed act, the use of the ordinary form of signature is persuasive evidence, and the absence of it may be of weight in the other scale. As well suggested by the learned judge below, if a will drawn with formality, or in terms that indicate the aid of counsel, or the intent to comply with all the forms of law, be signed with initials or first name only, doubt would certainly be raised as to the completed purpose of the testator to execute it, and if then it appeared that his habit was to sign his name in full, the doubt might become certainty; while on the other hand, if it were shown that he usually, or even frequently, signed business or other important papers in the same way, the doubt might be dissipated. As in all cases where the intent is the test, there can be no hard and fast legal rule as to form. The statute requires that the signature shall be at the end, and that requirement must be met without regard to intention; but what shall constitute a signature must be determined in each case by the circumstances.

Tested by these views, the will in the present case appears

to have been well executed. Of the handwriting and of the identity of the testatrix there is no question, and her completed intent to execute the paper, as the expression of her testamentary wishes, is attested at the end of it by a signature admitted to be made by her, and shown to be in the form which she habitually used. The writing has not the usual formalities of a will, but is in form a letter, addressed to no one by name, but clearly intended for her mother, or such of her family as should assume control of her property after her death; and the form of the instrument might well account for the signature she was accustomed to use, were it not still more clearly explained by the unfortunate differences with her husband, and her repugnance to using his name, as shown by her avoidance of it in her correspondence, and her direction not to put it on her tombstone. On the evidence, it is clear that the testatrix intended this as a complete execution of the instrument, and we find nothing in the law to defeat its validity for that purpose.

Judgment affirmed.

MARRIED WOMAN'S WILL. — THE POWER OF MARRIED WOMEN TO MAKE WILLS is discussed in an extended note to *Cutter v. Butler*, 57 Am. Dec. 340-349.

OLOGRAPHIC WILLS. — As to the sufficiency of an olographic will, see *Perkins v. Jones*, 84 Va. 358; 10 Am. St. Rep. 863, and note; note to *Lagrange v. Merle*, 52 Am. Dec. 591-593. As to the sufficiency of the signature to an olographic will, see *Waller v. Waller*, 1 Gratt. 454; 42 Am. Dec. 564, and note 571-573.

HOLMES AND SONS v. BRIGGS AND DRUM.

[121 PENNSYLVANIA STATE, 232.]

CHECK AS CONDITIONAL PAYMENT. — In the absence of any special agreement to the contrary, the mere acceptance by a creditor from his debtor of the check of a third person, payable to the creditor's order, for a pre-existing debt, is not absolute, but merely conditional, payment, defeasible on the dishonor or non-payment of the check, and the burden of proof is on the debtor to show that the check was taken as absolute payment.

CHECK AS CONDITIONAL PAYMENT. — Where a creditor has accepted from his debtor the check of a third party as conditional payment for an existing debt, the facts that he does not give the debtor prompt notice of the dishonor of the check, but retains it, and collects a dividend on it out of the assigned estate of the drawer, do not raise a presumption that the check was accepted as absolute payment, but that question is for the jury to determine.

CHECK AS CONDITIONAL PAYMENT — NOTICE OF DISHONOR TO DEBTOR. — Where the debtor has given his creditor the check of a third person in

payment of an existing debt, and the debtor is not a party to the check, either as drawer, payee, or indorser, he is not strictly entitled to notice of dishonor, and cannot complain of delay in giving such notice, without proof that he has actually sustained loss or damage thereby.

ASSUMPSIT by plaintiffs against defendants to recover the amount of a draft drawn upon defendants by Alexander & Co. Defendants sold live-stock for Alexander & Co. on commission, and drew on them for the proceeds, two thousand seven hundred dollars, the draft being sent to plaintiffs for collection. Defendants took up the draft by a cashier's check on the Penn Bank, drawn to the order of plaintiffs. A few days thereafter, said bank suspended, and the check was never paid. Plaintiffs held the checks for six or eight months before demanding payment of defendants, and during this time received a dividend out of the assigned estate of the Penn Bank. The fourth instruction asked by defendants, and refused by the court, was as follows: "4. That the failure on the part of Holmes and Sons to give notice to Briggs and Drum of the non-payment of said cashier's check, and their retaining possession of said check, without offer to surrender same until the present date, and collecting dividends thereon from the assignee of the Penn Bank, raise a sufficiently strong presumption that said check was accepted as absolute payment of the draft, to justify the jury in finding a verdict for defendants." Judgment for plaintiffs, and defendants appeal.

J. McF. Carpenter, for the appellants.

George B. Gordon, John Dalzell, and William Scott, for the appellees.

STERRETT, J. When this case was here before, the judgment was reversed, and a new *venire* ordered, solely because the learned president of the common pleas refused to submit to the jury the question whether the cashier's check was received as absolute payment of the Alexander & Co. draft, and directed them to find for plaintiffs. The facts sufficiently appear in the case as reported in *Briggs v. Holmes*, 118 Pa. St. 283; 4 Am. St. Rep. 597. On the last trial, the question referred to was fairly submitted to the jury, and they, in effect, found that the check was accepted, not as absolute, but as conditional, payment of the draft. That finding of fact virtually left the defendants without any available ground of defense.

There was no error in refusing to charge as requested in

defendants' first point, viz.: "That the acceptance by plaintiffs from defendants of the cashier's check of Penn Bank, drawn to plaintiff's order, for the amount of the draft of Alexander & Co., and the delivery to defendants of said draft, followed by failure on the part of plaintiffs to notify defendants of the dishonor of said cashier's check, and the retention of said check until the present time, and collection of dividends on account thereof, is a bar to plaintiffs' right to recover in this suit."

In saying to the jury that the facts recited in that point were for their consideration in determining the question submitted to them, the learned judge went as far as he was warranted in doing. Nothing is better settled than that, in the absence of any special agreement to the contrary, the mere acceptance, by a creditor from his debtor, of the note or check of a third person, to the creditor's order, for a pre-existing indebtedness, is not absolute, but merely conditional, payment, defeasible on the dishonor or non-payment of the note or check, and in that event the debtor remains liable for his original debt: *McGinn v. Holmes*, 2 Watts, 121; *McIntyre v. Kennedy*, 29 Pa. St. 448; *Brown v. Scott*, 51 Pa. St. 357; *Leagus v. Waring*, 85 Pa. St. 244; *Hunter v. Moul*, 98 Pa. St. 13; 42 Am. Rep. 610; *Cannonsburg Iron Co. v. Union Nat. Bank*, 34 Pittsb. L. J. 93; Benjamin on Sales, secs. 1082, 1083; 2 Parsons on Notes and Bills, 184, 185. The evidence of defendants tending to show that the check was received as absolute payment of the draft was submitted to the jury, but their finding was in favor of plaintiffs.

Defendants' fourth point was rightly refused. The facts therein recited were exclusively for the consideration of the jury, to whom they were properly submitted.

In view of the evidence, there is no error in the portions of the charge covered by the third and fourth specifications. It is contended that the learned judge erred in confining the jury to the consideration of the single question, "Was the check given and received as money?" and in charging that the burden of proving it was so received was on defendants. As to the burden of proof, he was clearly right. The question of fact, to which the attention of the jury was specially directed, was the only issue presented by the evidence. If there had been any testimony tending to show that defendants were in any way injured by the failure of plaintiffs to promptly give notice of non-payment of the check, etc., it would have been error to

have excluded it from the consideration of the jury; but there was none. The defendants were not parties to the check, either as drawers, payees, or indorsers. According to the law merchant, they were not strictly entitled to notice of dishonor, and have no just reason to complain of delay in giving them notice, unless they were prepared to show that they had actually sustained loss or damage by the omission of plaintiffs to notify them: Benjamin on Sales, secs. 1082, 1083; *Hunter v. Moul*, 98 Pa. St. 13; 42 Am. Rep. 610; 2 Parsons on Notes and Bills, 184. It is there said: "If paper be transferred, by delivery only, as security for a pre-existing debt, and it is dishonored while in the transferee's hands, it affects in no way the debt it was intended to secure. The original liability remains what it was; and upon dishonor of the paper, it was not even necessary to give him notice thereof as an indorser. The authorities are somewhat confused on that point; but the rule of law is, undoubtedly, that the debtor is not entitled to any technical notice, but may show, in defense, any injury he has sustained by the actual laches of the creditor."

We fail to discover any error in the trial of which appellants have any just reason to complain. Neither of the specifications of error is sustained.

Judgment affirmed.

CHECKS—DUTY OF HOLDER OF, IN ORDER TO MAKE DRAWER OR INDORSER LIABLE THEREON.—The holder of a check, in order to recover against the drawer or indorser, must prove due presentment for payment to the bank, its refusal to pay, and notice of non-payment to the drawer or indorser, or some legal excuse for the absence thereof: *Mechanics' etc. Ins. Co. v. Coons*, 35 La. Ann. 364; *Case v. Morris*, 31 Pa. St. 100; *Purcell v. Allemong*, 22 Gratt. 739; *Pollard v. Bowen*, 57 Ind. 232; *Harker v. Anderson*, 21 Wend. 372; *Murray v. Judah*, 6 Cow. 484; *Little v. Phenix Bank*, 2 Hill, 425; *Sherman v. Comstock*, 2 McLean, 19. On this point the court said, in *Purcell v. Allemong*, 22 Gratt. 739: "A check is an inland bill of exchange drawn on a bank, or other house of deposit. The drawer undertakes that the bank will pay to the payee or holder the sum named in the check, and the payee having received the check, the drawer is not liable to pay it, if he drew it in good faith, until the holder has demanded and failed to obtain payment from the bank upon which it was drawn. If the bank refuses to pay, the holder, as a general rule, has no right of action against it, but must look to the drawer for payment; but the drawer may have his action against the bank for refusing to honor his check, but not until the same has been presented, and payment refused. It is consequently well settled, as a general rule, that the holder of a check has no recourse against the drawer until the check has been presented to the bank, and payment refused."

The check must also be presented for payment within a reasonable time, in order to hold the drawer, in case of non-payment; and an unreasonable delay

in presenting the check is generally at the peril of the holder: *Woodruff v. Plant*, 41 Conn. 344; *Cruger v. Armstrong*, 3 Johns. Cas. 5; 2 Am. Dec. 124; *Harber v. Anderson*, 21 Wend. 372; *Cork v. Bacon*, 45 Wis. 192; 30 Am. Rep. 712; *Taylor v. Sip*, 30 N. J. L. 234.

While the holder of a bank check does not lose his recourse on the drawee by the mere act of delay, still it is his duty to present the check for payment within a reasonable time, and give notice to the drawer of its dishonor within a like reasonable time; and if he fails to do so, the delay is at his peril: *Stevens v. Park*, 73 Ill. 357. In *Daniels v. Kyle*, 5 Ga. 245, it is said "that a check, unlike a bill of exchange, is generally designed for immediate payment, and not for circulation; and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own peril." If, after his failure to present it within a reasonable time, the bank fails between the time of the execution and presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by reason thereof. A check "must be presented within a reasonable time, in order to charge the drawer or indorser, in case of failure of the drawee. The fact that it is presumed to be drawn against deposited funds makes it of even greater importance than in case of a bill that a check should be presented, and that the drawer should be notified of the non-payment, and that he or any indorser should be discharged by the neglect of notice": *Purvell v. Alkmon*, 22 Gratt. 743. In *Springfield v. Green*, 7 Bart. 301, it was decided that the failure of the holder who has accepted a check in payment to present it for payment within a reasonable time relieves the drawer from liability in case of the bank's becoming insolvent in the mean time.

What is such reasonable time in which to present the check for payment generally depends upon the circumstances of the case and the relations which exist between the parties: *Taylor v. Sip*, 30 N. J. L. 234. It may be extended by the assent of the drawer, express or implied: *Woodruff v. Plant*, 41 Conn. 344; *Holmes v. Roe*, 62 Mich. 199; 4 Am. St. Rep. 844. It becomes a question of law for the court, where there is no dispute about the facts: *Mohawk Bank v. Broderick*, 10 Wend. 304; 13 Wend. 133; 27 Am. Dec. 192; *Himmelmamm v. Hotelling*, 40 Cal. 111; 6 Am. Rep. 600; *Cassels v. Brownish*, 6 Bush, 457; 99 Am. Dec. 684. It is an almost universal rule, however, that if the bank upon which the check is drawn and the holder are in the same place, the check must, in the absence of special circumstances, be presented for payment within the banking hours of the day it is received, or on the day after it is received, and if the bank fails in the mean time, the loss will unquestionably fall upon the drawer: *Holmes v. Roe*, 62 Mich. 199; 4 Am. St. Rep. 844, and cases cited therein; *Simpson v. Pacific Mut. Life Ins. Co.*, 44 Cal. 120; *Wear v. Lee*, 87 Mo. 358; *Syracuse etc. R. E. Co. v. Collins*, 57 N. Y. 641; *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Smith v. Jones*, 20 Wend. 192; 32 Am. Dec. 527; *Taylor v. Wilson*, 11 Met. 44; 45 Am. Dec. 180; *Andrews v. German Nat. Bank*, 9 Heisk. 211; 24 Am. Rep. 300; *Cassels v. Brownish*, 6 Bush, 457; 99 Am. Dec. 684; *Himmelmamm v. Hotelling*, 40 Cal. 111; 6 Am. Rep. 600. If, however, the holder has knowledge of the insolvent or precarious condition of the bank, he must present the check for payment at once at the first opportunity, or the drawer will be relieved from liability: *First Nat. Bank v. Alexander*, 84 N. C. 30. It seems that where the check is received on Saturday, the holder has until the close of banking hours on Monday in which to present it for payment: *O'Brien v. Smith*, 1 Black, 99; *Freiberg v. Cody*, 55 Mich. 108. As illustrations of the above rule, it may be said that a violent storm, and the fact that the holder

resides some distance from the bank, will not excuse a failure to present the check for payment on the day or day after it is received: *McDonald v. Mosher*, 23 Ill. App. 206. Where a check was given on Monday, and not presented for payment until Wednesday, the bank having failed in the mean time, the drawer was held to be discharged: *State v. Gates*, 67 Mo. 139; *Farwell v. Curtis*, 7 Biss. 160. The defendant firm, who were indebted to the plaintiff firm, forwarded a draft to another firm doing business in the same place as plaintiff, who presented the draft and received the firm's check. Plaintiff then deposited the check in its own bank, and presented it the next day, when the bank had failed, though if it had been presented on the day when received it would have been paid. The court decided that plaintiff was guilty of laches, and defendant released from liability: *Smith v. Miller*, 43 N. Y. 471; 3 Am. Rep. 690; 52 N. Y. 545. The same rule prevails in relation to the indorser of a check as in case of the drawer, namely, that it must be presented for payment within a reasonable time, and the holder is allowed until the next day after receiving it for that purpose: *Veasie Bank v. Winn*, 40 Me. 60.

If the holder of the check and the banker on whom it is drawn reside in different places, the check must, in the absence of special circumstances, be forwarded by mail for presentment on the day, or on the next secular day after, it is received, and the agent or person to whom it is forwarded must, in like manner, present or forward it on the day or day after he receives it, in due course of mail, otherwise the drawer or indorser will be released: *Smith v. Jones*, 20 Wend. 192; 32 Am. Dec. 527; *Woodruff v. Plant*, 41 Conn. 344; *Werk v. Mad River etc. Bank*, 8 Ohio St. 301; *Middletown Bank v. Morris*, 28 Barb. 616; *Holmes v. Roe*, 62 Mich. 199; 4 Am. St. Rep. 844; *Burkhater v. Second Nat. Bank*, 42 N. Y. 538; *Griffin v. Kemp*, 46 Ind. 176. The delay in presentment is not unreasonable where the holder received the check on Friday, at a place twenty miles from the bank, and his place of business being twenty miles in an opposite direction, he deposited the check in a bank there on the next Monday, and the payee bank failed that day: *Freiberg v. Cody*, 55 Mich. 108.

So where a check drawn in New York upon a Mississippi bank, and payable on demand, was presented for payment ten months after date, and, shortly after, the bank suspended payment, though holding funds of the drawer at the time of presentment, the delay is so unreasonable as to relieve the drawer from responsibility: *Little v. Phenix Bank*, 2 Hill, 425. Where a check was received in S. on January 14th, drawn on a bank in A., removed a distance of fourteen miles, and between which places there was a daily mail, and it was not presented for payment until February 6th, it was decided that an indorser was discharged by the holder's laches: *Mohawk Bank v. Broderick*, 10 Wend. 304; 13 Wend. 133; 27 Am. Dec. 192. Where a party residing four miles from a post-office received a check in the evening, in midwinter, on a bank in a town fifteen miles away, and the only mail that left such post-office closed at 7:30 o'clock, A. M., the next day, and the next mail after that closed at the same hour three days thereafter, but the check was not sent by either mail, and the payee bank stopped payment before it was presented, but after it would have been presented if sent by either mail, the court determined that there was not such delay in forwarding the check as would relieve the drawer: *Cox v. Boone*, 8 W. Va. 500; 23 Am. Rep. 627.

Where presentment and notice of non-payment would be of no benefit to the drawer or indorser, they may be dispensed with, and are not necessary, in order to make such drawer or indorser liable. Thus presentment and

notice are unnecessary when the drawer has no funds in bank to meet the check: *Bell v. Alexander*, 21 Gratt. 1; *Shaffer v. Maddox*, 9 Neb. 205; *Fletcher v. Pierson*, 69 Ind. 281; 35 Am. Rep. 214; *Brush v. Barrett*, 82 N. Y. 400; 37 Am. Rep. 569; *Foster v. Paulk*, 41 Me. 425; *Cox v. Morris*, 31 Pa. St. 100. Or where he has withdrawn them from the bank: *Deener v. Brown*, 1 MoAr. 350; *Fletcher v. Pierson*, 69 Ind. 281; 35 Am. Rep. 214; *Moody v. Mack*, 43 Mo. 210. Or where the bank has become insolvent within the reasonable time allowed for presentment: *Warrensburg etc. Ass'n v. Zoll*, 83 Mo. 94; *Syracuse R. R. Co. v. Collins*, 3 Lana. 29. The holder of a bank check neglected for eight days to present it for payment. In the mean time the bank failed, and previous to the failure the drawer had withdrawn all his funds. In such case the drawer is liable to the holder of the check, although the bank would have paid it if promptly presented: *Kinyon v. Stanton*, 44 Wis. 479; 28 Am. Rep. 601.

As a general rule, the drawer or indorser of a check is not discharged from liability by the holder's omission, delay, or laches in presenting it for payment within a reasonable time, and in not giving notice of dishonor or non-payment, unless such drawer or indorser has suffered some actual loss or damage through the failure of the bank or otherwise, and then he is only discharged *pro tanto*: *Stewart v. Smith*, 17 Ohio St. 82; *Henshaw v. Root*, 60 Ind. 220; *Compton v. Gilman*, 19 W. Va. 312; 42 Am. Rep. 776; *Cox v. Boone*, 8 W. Va. 500; 23 Am. Rep. 627; *Cogswell v. Rockingham etc. Bank*, 59 N. H. 43; *Bell v. Alexander*, 21 Gratt. 1; *Cork v. Bacon*, 45 Wis. 192; 30 Am. Rep. 712; *Pack v. Thomas*, 13 Smedes & M. 11; 51 Am. Dec. 135; *Allen v. Kramer*, 2 Ill. App. 205; *Griffin v. Kemp*, 46 Ind. 172; *Smith v. Jones*, 2 Bush, 103; *Purcell v. Allemong*, 22 Gratt. 739; *Morrison v. McCartney*, 30 Mo. 183. If the maker has withdrawn from the bank his entire deposit against which the check is drawn, he is not injured by any delay in not presenting it for payment, or any lack of formal notice of its non-payment before action brought: *Emery v. Hobson*, 63 Me. 32; *Kinyon v. Stanton*, 44 Wis. 479; 28 Am. Rep. 601; *Deener v. Brown*, 1 MoAr. 350. In *Hoyt v. Seeley*, 18 Conn. 353, the holder of check did not present it for payment until the expiration of more than two years from the time he received it, and neglected to give notice of dishonor or non-payment to the drawer. The drawer never had funds in the bank with which to pay it, but once before payment was refused, and then the funds were immediately drawn out by himself; and the court decided that as the bank was not insolvent, and as no injury had resulted to the drawer from want of notice or non-presentment, he was still liable on the check. When, however, the check is not presented within a reasonable time, and the drawer sustains actual damage through the delay, the fact that the delay was caused by the negotiation of the check, in good faith, through different hands, is no excuse for the holder, and the drawer is discharged: *Mohawk Bank v. Broderick*, 13 Wend. 133; 27 Am. Dec. 192. Delay in presenting the check for payment may, however, be excused, although loss results therefrom to the drawer, when an agreement exists between him and the payee or holder that the check is not to be presented until a certain time: *Barclay v. Weaver*, 19 Pa. St. 396; *Pollard v. Bowen*, 57 Ind. 232. It seems that the burden of proof is on the holder of the check to show that no loss or injury has resulted to the maker through delay in making presentment and giving notice: *Stevens v. Park*, 73 Ill. 387; *Little v. Phenix Bank*, 2 Hill, 425.

As between the holder of the check and an indorser, an unreasonable delay in presenting it for payment will discharge the latter, although it does not appear that he has suffered any loss thereby: *Mohawk Bank v. Broderick*, 10

Wend. 304; 13 Wend. 183; 27 Am. Dec. 192; *Gough v. Statts*, 13 Wend. 549; *Peonie Bank v. Wins*, 40 Me. 60. So the indorser of a check held seven days before presentment is not liable, even though there were no funds in bank to the drawer's credit when the check was drawn: *Northwestern Coal Co. v. Bowman*, 69 Iowa, 150. The rule is sometimes adhered to, however, that the indorser is only entitled to such presentment and notice as will save him from loss: *Small v. Franklin Mining Co.*, 99 Mass. 277. This doctrine was maintained where, under an agreement between the parties, the holder retained the check for more than a year before presenting it to the bank upon which it was drawn, during which time the maker withdrew his funds from the bank, and became insolvent: *Emery v. Hobson*, 62 Me. 578. Where one indorses a check as surety, he must be presumed to know that it is not to be used in the usual manner, but that it is to be held for some time; and he is not released from liability by the fact that payment was not demanded within a reasonable time, unless he also shows, either an extension of time to the principal debtor without his assent, or a specified limitation by himself: *Newman v. Kaufman*, 28 La. Ann. 865; 26 Am. Rep. 114.

FRIEND v. CITY OF PITTSBURGH.

[181 PENNSYLVANIA STATE, 306.]

MUNICIPAL CORPORATION NEED NOT SEEK ITS CREDITOR and tender him money due from it, in order to stop the accumulation of interest on its debt.

MUNICIPAL CORPORATION — PLACE OF PAYMENT OF INDEBTEDNESS — INTEREST.—The municipal treasury is the place where the municipality's bonds are to be paid, unless some other place is expressly provided; and until a bond has been there presented and payment refused at maturity, the city is not liable for subsequently accruing interest, if it has funds on hand to pay the bond at maturity.

MUNICIPAL CORPORATIONS — BONDS — PAYMENT — INTEREST.—The holder of a municipal bond payable in installments, but not presented for payment until the last one matured is entitled to recover interest on overdue installments up to such time as the city provided funds for their payment.

W. W. Thompson, for the appellant.

W. C. Moreland, for the appellee.

PAXSON, C. J. This suit was brought in the court below against the city of Pittsburgh to recover the amount due on a bond given by said city, and payable by installments. There was no dispute as to the amount of the bond, nor that the respective installments were all due; the contention was over the question of interest on the respective installments after their maturity.

It appeared, upon the trial below, that no demand had ever been made by the holder of the bond for payment, and that, for a portion of the time at least, the money had been provided for its payment, and was in the city treasury. Under

these circumstances the learned judge instructed the jury as follows: "Therefore, as I say, the simple question is this: Did the city of Pittsburgh provide the means for the payment of these bonds? If she did, before the maturity of the bond, that is, by the maturity of the last payment, then the interest would stop from that date, and you will fix the time when that provision was made. As I have said before, the evidence does not satisfy me that a provision was made before 1880. It is a question of fact, however, for you, and you will fix the time, and allow interest on the installment from the time it came due, up until the time that you find that the city had provided for the payment of the bonds. That is all the interest the plaintiff is entitled to, in my judgement." This and other instructions of like tenor, were assigned for error here.

The contention of the plaintiff is, that a municipal corporation, like an individual, must seek out its creditor, if it desires to stop interest, and tender him the money due. If this contention is well founded, the effect of it will be to work a revolution in the mode of transacting business with such municipalities. Singularly enough, the precise point does not appear to have been decided in this state; yet there are plenty of *dicta* scattered through our books, which plainly show the bent of the judicial mind. In the case of *Luzerne Co. v. Day*, 23 Pa. St. 141, it was said by this court: "When a legal claim is presented for payment, it is the duty of the commissioners to draw their warrant for its payment. If this is refused, or if the order is not paid when demanded, a suit will lie against the county; but until demand is made, neither the commissioners nor the county are in default, and without it a suit cannot be maintained." And in *Allison v. Juniata Co.*, 50 Pa. St. 851, it was held that the holder of a county warrant or order cannot recover interest, even after demand, and non-payment for want of funds.

It is true, these cases were put partly upon the ground that such orders are neither bills, notes, checks, nor contracts, nor even a satisfaction of the original indebtedness. Had the action been upon such original indebtedness, as was said in *Dyer v. Covington Township*, 19 Pa. St. 200, the court could decide whether it was a case for the allowance of interest or not. In *Emlen v. Lehigh Coal etc. Co.*, 47 Pa. St. 76, 86 Am. Dec. 586, it was said by Justice Read, in discussing the general rule upon the allowance of interest: "There are, however, exceptions to the general rule, as in the case of banks, who are the

debtors of their depositors, and of trustees who have not failed in the discharge of their trusts. And we must undoubtedly add the cases in which the United States and the several states have been prepared to pay their loan-holders when their loans fell due, of which it is their practice to notify their creditors beforehand. . . . The result is, that these debts are payable at a fixed period, . . . at which time and place the loan-holder is to present his evidence of debt and receive payment. Whether he does or not, interest stops from that moment." The point decided in that case was, that the Lehigh Coal and Navigation Company was not bound to seek its creditor in a foreign country, and make a tender, in order to stop interest.

In the state of Illinois it has been repeatedly decided that municipal corporations are not bound to discharge their indebtedness elsewhere than at their treasuries: *City of Pekin v. Reynolds*, 31 Ill. 529; 83 Am. Dec. 244; *People v. Tazewell Co.*, 22 Ill. 147; *Johnson v. Stark Co.*, 24 Ill. 75; *South Park Commissioners v. Dunlevy*, 91 Ill. 49. It must be conceded that this is the rule applicable to the United States and to the several states. And the rule does not depend upon the fact alone that in such instances no suit would lie. It rests upon the broader ground of public policy and public convenience, and the further reason that, as to all municipal organizations or governments, the municipal treasury is the recognized place where all claims against it shall be paid. This rule has been recognized by common consent, by every person, and in every place. The reason of it applies with equal force to a city as to a state. The only difference between them is, that one can be sued; the other cannot. It would entail intolerable inconvenience if the rule were otherwise. The bonds of some municipal corporations are largely held in every state in the Union, and in nearly every nation abroad. It is impossible, in many instances, for such corporations to know their creditors, or where they reside. To hold that they must find them, and tender the amount of their debt, before interest could be stopped, would entail endless confusion, and do no practical good. Their obligations are as much payable at their treasury as if so "nominated in the bond," and it is so understood by all who deal with them.

We regard the instructions of the court below as favorable to the plaintiff as he was entitled to. There is nothing in the remaining specifications of error which requires discussion.

Judgment affirmed.

MUNICIPAL CORPORATIONS. — PAYMENT OF CITY DEBTS. — Municipal corporations are not, like individuals, bound to seek their creditors, to make payment of their indebtedness: *City of Pekin v. Reynolds*, 31 Ill. 529; 83 Am. Dec. 244, and note. The indebtedness of a municipality does not bear interest, in the absence of an express agreement to that effect, and of legislation giving power to contract for the payment of interest: *City of Pekin v. Reynolds*, 31 Ill. 529; 83 Am. Dec. 244, and note. But see *County of Jackson v. Rendleman*, 100 Ill. 379; 39 Am. Rep. 44.

OLIVER v. PITTSBURGH, VIRGINIA, AND CHARLESTON RAILROAD COMPANY.

[181 PENNSYLVANIA STATE, 408.]

EMINENT DOMAIN — COMPENSATION — EJECTMENT. — Where a land-owner has consented to the entry by a corporation; and sees the expenditure of large sums of money made upon the ground in the construction of a continuous line of railroad, he cannot treat the entry as a trespass. He does not, however, lose his right to compensation, and may proceed under the statute to have his damages assessed, as well after as before the construction of the road, or he may maintain ejectment. The latter action will, however, be treated as equitable in its character, and execution will be stayed upon the judgment therein for a reasonable time, to enable the corporation to proceed and have the damages assessed as of the date of the entry.

EMINENT DOMAIN — COMPENSATION — EJECTMENT — PARTIES. — Where the owner of land entered upon by a railroad company dies intestate, without being compensated for the land taken, his heirs, and not the administrator, are the proper parties to maintain an equitable ejectment to compel the corporation to pay the land damages, when nothing has been done in the lifetime of the intestate to work a conversion of the realty into money.

EJECTMENT for a strip of land. In 1868, the land in dispute was owned by Robert Oliver, who died intestate in that year, leaving, as survivors and heirs, his wife, and son, Robert. In 1870, the widow, for a valuable consideration, and while in possession of the land, granted the defendant company a right of way for its road through said land. In the next year, the company constructed its road, took possession of the ground in dispute, and has held it since, up to the time of suit. One McClure, the duly appointed and qualified guardian of said Robert, saw the road built through the land, without objection on his part. The defendant company never gave bond for the payment of compensation to or for the use of said Robert for the right of way, nor did it pay him for it, and no claim or demand was ever made on his behalf for compensation. The widow, Martha Oliver, died in 1872, and said Robert dies'

intestate in 1882, leaving the plaintiffs, his cousins, as heirs and next of kin. Verdict and judgment for plaintiffs, and defendant appeals.

William Scott, John H. Hampton, and George B. Gordon, for the appellant.

George P. Graver and D. T. Watson, for the appellees.

WILLIAMS, J. Corporations clothed with the right of eminent domain enter upon the land of private owners in one of the following ways: They enter upon giving security for the payment of the damages to be done by their entry, when ascertained, and thereby acquire title, without regard to the consent of the owner, by virtue of the statute. They enter in pursuance of a bargain with or leave given by the owner, and their title rests on their bargain or contract, and not on the statute. Or they may enter without compliance with the law or treaty with the owner, in which case they acquire no title, but are trespassers, and liable to an action of trespass or ejectment, at the election of the owner. The owner may be unable to agree with the corporation as to the injury sustained by him, and the statutory proceeding may have to be proceeded with until a final adjudication can be had; but the corporation may enter, meantime, and proceed with the construction of their improvements, and the owner cannot interfere. If, however, he treats with the corporation, and they enter under permission from him, he stands on the same ground when contracting with a corporation as when contracting with an individual. He is bound by his agreements in the same manner, and estopped by the same equitable considerations, in the one case as in the other. If he consents to the entry by the corporation, and sees the expenditure of large sums of money made upon the ground in the construction of a line of railroad, part of an extended line over which the corporation is engaged in carrying passengers and freight as a common carrier, he ought not to be allowed to treat their entry as a trespass.

He does not, however, lose his right to compensation, and can proceed under the statute to have his damages assessed, as well after as before the construction of the road. Whether he should be permitted to proceed also by action of ejectment might, if now presented for the first time, require careful consideration. But we must regard this question as already settled in favor of the right to maintain such action by a series

of cases, among which may be cited *McClinton v. Pittsburg etc. R'y Co.*, 66 Pa. St. 404; *Wheeling etc. R'y Co. v. Warrell*, 122 Pa. St. 613; *Allegheny V. R'y Co. v. Colwell*, decided at the October term, 1888; *Philadelphia etc. R'y Co. v. Cooper*, 105 Pa. St. 239. In all the cases, however, in which the entry was made with the knowledge and consent of the owner, the action has been treated as equitable in its character. The corporation, having been permitted to enter in advance of the ascertainment of damages, did not thereby lose its right to proceed in the usual manner to secure their adjustment through the courts, and the action of ejectment has been sustained as a means of quickening the action of the corporation in this regard. While the owner has not parted with his title by his own conveyance, or had it divested by proceedings under the statute, he has parted with the possession under circumstances, and permitted expenditures upon and use of the property, of such a character as to make it inequitable for him to resume the possession, or to defeat the right of the corporation to proceed under the statute, and add to its lawful possession a lawful title, by virtue of compliance with its provisions.

In *Allegheny V. R'y Co. v. Colwell*, decided at the October term, 1888, it was said: "But as Colwell was at least passively derelict in knowingly permitting the railroad company to occupy and put its improvements on his land, we agree that it would be inequitable to allow the judgment to work a forfeiture of those improvements"; and execution was accordingly stayed upon the judgment, to enable the railroad company to proceed under the statute, and have the damages assessed. There was in that case, and there is in this, no contract for the sale of the right of way capable of enforcement by means of a conditional verdict in ejectment; but the equities growing out of the entry by permission, the expenditure of money, and the construction through the premises of a continuous line of railroad, so that resumption of possession by the land-owner would interrupt the traffic of the entire line, required us to send him to the tribunal which the law provides, for the ascertainment of the damages to which he was entitled. The effect of the permissive entry is thus made the same as if a formal contract had been entered into, by which the land-owner had agreed to put the corporation into possession, and accept as compensation such sum as might be awarded to him by proceedings under the general law. This protects the corporation in the expenditures made in conse-

quence of its lawful entry on the land, while it secures to the owner the full measure of compensation to which he is entitled, under the law, for the entry and appropriation by the corporation.

In the case now before us, the railroad company entered under a formal release of the right of way by the widow, who was in actual possession and the holder of an estate for life in the land, and with the knowledge and acquiescence of the guardian of the plaintiff's intestate. Its entry was in no sense a trespass, therefore, but was rightful, subject only to an ascertainment of the damages done to the remainderman. These should be assessed as of the date of the entry. It is urged that the damages, when assessed, do not belong to the plaintiffs below, and that their action must fail for that reason, and the damages be awarded to the administrator of the intestate, under whom they claim as heirs at law. But the damages were not assessed in the lifetime of the decedent, nor were any steps taken to that end. Nothing was done, therefore, that could divest his title, and substitute its value in money therefor. That title descended, consequently, to his heirs at law, who now stand in his stead, and are clothed with his rights. *Davis v. Titusville etc. R'y Co.*, 114 Pa. St. 308, and kindred cases, are therefore not applicable.

Judgment affirmed, but stay of execution thereon ordered for ninety days, to enable the railroad company to proceed under the statute, and procure the condemnation of the land and the assessment of damages as of the date of the original entry; the costs to be paid by the railroad company when taxed.

THE PRINCIPAL CASE is distinguished from the case of *Kiel v. Chartiers F. G. Co.*, 131 Pa. St. 466, *post* p. 823, in which case the corporation was liable in trespass for entering upon plaintiff's land without payment of damages for the taking thereof, or offer of security for such payment.

EMINENT DOMAIN — RAILROAD COMPANIES — TRESPASS. — A railroad company which enters upon land with the consent of the owner or mortgagor, and, without objection from any one, constructs its road for fifteen years without acquiring title or paying damages, does not thereby become a trespasser: *St. Johnsbury etc. R. R. Co. v. Willard*, 61 Vt. 134; 15 Am. St. Rep. 887; *Lafferty v. Schuykill etc. R. R. Co.*, 124 Pa. St. 297; 10 Am. St. Rep. 587. But one is not estopped to claim compensation for a right of way by permitting a railroad company to construct its road over his land, and operate it without interference: *Thornton v. Sheffield etc. R. R. Co.*, 84 Ala. 109; 5 Am. St. Rep. 337. And he may even maintain an action of ejectment against the company, where he has not been offered compensation for his land: *Terre Haute etc. R. R. Co. v. Rodel*, 87 Ind. 128; 46 Am. Rep. 164. Compare *Louisville etc. R'y Co. v. Soltsieddle*, 116 Ind. 257; 9 Am. St. Rep. 852; *McAulay v. Western etc. R. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627.

REESE v. PENNSYLVANIA RAILROAD COMPANY.

[21 PENNSYLVANIA STATE 422.]

RAILROADS — REGULATIONS — FARES AND TICKETS. — Railroad companies may make reasonable regulations, not only as to the amount of fare, but as to the time, place, and mode of payment. They may refuse to carry without the previous procurement of a ticket, or they may charge an additional or higher rate of fare to those who do not procure tickets before entering the cars, provided passengers are given a convenient place and opportunity to buy tickets.

RAILROADS — REGULATIONS — FARES AND TICKETS. — A regulation requiring passengers who board a train without a ticket, after having had an opportunity to procure one, to pay a small sum in excess of the regular fare, such excess to be refunded at any regular ticket-office on the road, upon presentation of a check therefor, given by the conductor, is valid, and not unreasonable nor oppressive, nor open to the objection that the excess thus imposed is a part of the fare, and makes it higher than the rate allowed by law.

RAILROADS — REGULATIONS — FARES AND TICKETS. — A regulation requiring that a sum in excess of the regular fare shall be collected from passengers who board a train without having procured a ticket, after having had an opportunity to do so, such excess to be refunded at any regular ticket-office on the road, upon presentation of a check given therefor by the conductor, but excepting from its operation passengers getting on trains at stations where no tickets are sold, or where, on account of an excessive rush of business, it is impossible to issue the refunding check, and providing that in such cases the collection of the excess shall be omitted, is valid, and not unreasonable, oppressive, or partial.

TRESPASS to recover damages for ejectment from a passenger train. Plaintiff boarded defendant's train at a station where tickets were sold, without having bought one, although he had time and opportunity to do so. The law under which defendant was incorporated provides that "in the transportation of passengers, no charge shall be made to exceed three cents per mile for through passengers, and three and one half cents per mile for way passengers." When the conductor asked plaintiff for his ticket, the latter said he had none, and tendered fourteen cents, the regular fare between the stations of his journey. The conductor refused to accept the sum tendered, and demanded an additional sum of ten cents, or twenty-four cents altogether. This sum the plaintiff refused to pay, and so was put off the train at the next station. The conductor in so doing acted under a regulation of the defendant company, which will appear hereafter. The public were given notice of this regulation by means of printed cards posted at ticket-offices, and two such notices were posted at the station where plaintiff boarded the train. The conductor

testified that before demanding the twenty-four cents of plaintiff, he explained to him the regulation, and that under it a duplex check would be given him, redeemable at any ticket-office along the road. This plaintiff denied, and also that he had any notice of the regulation by means of the posted public notice, although he admitted that he had heard of and read of the regulation in the newspapers. The regulation mentioned, and the rules given conductors for the enforcement thereof, are as follows:—

“An excess of ten cents will be charged on all fares paid on trains. Passengers paying such fares will be furnished, by the conductors, with a memorandum, upon presentation of which at any ticket-office of the Pennsylvania railroad division the excess of ten cents will be refunded. Passengers are respectfully requested to purchase tickets at the regular ticket-offices of the company, as far as practicable.”

“The following rules will, until further notice, govern the issue of duplex tickets on the Pittsburgh division.

“The collection of excess must be omitted as follows:—

“1. When passage is taken from non-ticket stations, whether the destination is a ticket station, or a non-ticket station.

“2. When passage is taken from a ticket station the office of which being closed by authority, regardless of the passenger's destination.

“3. When, on account of a large crowd, it is impossible to issue duplex tickets without losing cash fares, or leaving tickets in the hands of passengers.

“4. In cases of small children traveling alone, and of sick, aged, or infirm persons who have not money enough to pay the excess.

“5. When excursion tickets are issued.

“6. Omit the collection of excess in connection with New York and Chicago limited express extra fares; and, also, when ordered, collections are made on second-class and emigrant tickets.

“In all cases, except as above noted, conductors must courteously enforce the collection of excess, as prescribed in circular 160; and require the persons who refuse to pay it to leave the train, and if necessary, without undue force or violence, eject them at the next station, as provided in the book of rules.”

Under the instructions of the court, there was a verdict for plaintiff, and judgment having been entered on the verdict, defendant appeals.

George B. Gordon, John H. Hampton, and William Scott, for the appellant.

A. C. Johnston and Levi Bird Duff, for the appellee.

MITCHELL, J. The right of railroad companies to make reasonable regulations, not only as to the amounts of fares, but as to the time, place, and mode of payment, is unquestionable. This right includes the right to refuse altogether to carry without the previous procurement of a ticket: *Lake Shore etc. R'y Co. v. Greenwood*, 79 Pa. St. 373. That case arose upon a special regulation as to the carriage of passengers upon freight trains; but there is no appreciable distinction between it and a general regulation as to all passengers. Both rest on the common-law principle that requires payment or tender as an indispensable preliminary to holding a carrier liable for refusal to carry, and on the manifest and necessary convenience of business, where the number of passengers is liable to be large and the time for serving them short.

So, too, the authorities are uniform that companies may charge an additional or higher rate of fare to those who do not purchase tickets before entering the cars: *Crocker v. New London etc. R. R. Co.*, 24 Conn. 249; *Swan v. Manchester etc. R. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *Hilliard v. Gould*, 34 N. H. 241; 66 Am. Dec. 765; *Stephen v. Smith*, 29 Vt. 160; *State v. Gould*, 53 Me. 279; *State v. Chovin*, 7 Iowa, 208; *Du Laurans v. First Div. etc. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *State v. Hungerford*, 39 Minn. 6; 34 Am. & Eng. R. R. Cas. 265, and note; *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; 68 Am. Dec. 562; *Pullman Palace Car Co. v. Reed*, 75 Ill. 180; 20 Am. Rep. 232; *Cincinnati etc. R. R. Co. v. Skillman*, 39 Ohio, 451; *Forses v. Alabama etc. R. R. Co.*, 63 Miss. 67; 58 Am. Rep. 801. And it may be noted, in response to one of the most urgently pressed arguments of the defendant in error, that the reasons almost uniformly given in support of this long line of decisions include the furthering of the honest, orderly, and convenient conduct by the railroad company of its own business.

The regulation in question in the present case is not in itself unreasonable or oppressive. In regard to the traveler, it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey, instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other passengers, and still more to the railroad company, the regulation

is conducive to the rapid, orderly, and convenient dispatch of the conductor's part in the collection of fares, and thus to leaving him free for the performance of his other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care.

If, therefore, the company may refuse to carry at all without a ticket, it may fairly refuse under the far less inconvenient alternative to the traveler of putting him to the trouble of going to an office to get his excess refunded. If the company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it; and as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveler, its validity, upon general principles, and on authority, would seem to be beyond question.

These views were conceded by the learned judge below, and are not seriously questioned by counsel here. But the decision was based upon the view that the extra ten cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the act of incorporation of the company. The language of the act is: "In the transportation of passengers, no charge shall be made to exceed . . . three and one half cents per mile for way passengers." As the distance from East Liberty station to the Union station in Pittsburgh is four and one half miles, and the regular fare fourteen cents, it is admitted that the extra ten cents is in excess of the charter rate, if it is a "charge for transportation" within the meaning of the act. Should it be so regarded? "Charge" is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions, one (10 b) is, "The price required or demanded for service rendered, or (less usually) for goods supplied"; and this expresses accurately the sense of the word in the present case. The essence of the meaning is, that it is something required, exacted, or taken from the traveler as compensation for the service rendered, and, of course, something taken permanently,—not taken temporarily, and returned. The purpose of the restriction in the charter is the regulation of the amount

of fares, not of the mode of collection; the protection of the traveler from excessive demands, not interference with the time, place, or mode of payment. These are mere administrative details, which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge within the prohibition of the charter.

Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair, and impartial, because it provides that, as to passengers getting on the train at stations where there is no ticket-office, etc., or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding check, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable, and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts in express words a necessary exception which the law would otherwise imply. So as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount, and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike, and dispense with the regulation for the time being. Necessity modifies the application of all rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgement, he cannot perform it fully.

No authorities precisely in point have been found upon either side. The cases cited by the defendant in error from Kentucky and Ohio are widely distinguishable, as they were cases of absolute charge beyond the charter limit, without any provision for return of the excess to the traveler. But on well-settled principles we are of opinion that the regulation is reasonable in itself, and not in violation of the restriction in the act of incorporation. The defendant's first point should therefore have been affirmed.

Judgment reversed.

RAILROAD COMPANIES — REGULATIONS — FARES AND TICKETS.—Railroad companies as carriers of passengers may adopt and enforce reasonable rules with respect to fares and tickets: *Pittsburgh etc. R'y Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517, and note; such as a regulation requiring passengers to procure tickets before taking passage, or in default thereof, to pay additional fare: *Poole v. Northern Pac. R. R. Co.*, 16 Or. 261; 8 Am. St. Rep. 289, and note. See also extended note to *Cheney v. Boston etc. R. R. Co.*, 45 Am. Dec. 192-199.

KEIL v. CHARTIERS VALLEY GAS COMPANY.

[181 PENNSYLVANIA STATE, 466.]

EMINENT DOMAIN — TRESPASS — DAMAGES — EVIDENCE.—Where a corporation has entered upon the land of another, without payment of damages for the land taken, or offer of security therefor, trespass will lie for damages for the breach of the close. The subsequent tender of a bond, and proceedings for condemnation of the land, do not divest the right of action for the trespass, but the damages arising from the appropriation must be assessed in the condemnation proceedings. Hence evidence of the market value of the land appropriated is inadmissible in the action of trespass, and if admitted, the error is not cured by an instruction that plaintiff may recover damages for the trespass only to the time of the approval of the bond, without turning the attention of the jury away from the incompetent evidence. The only damages recoverable in the action of trespass are those sustained from the breach of the close, any deprivation of use, or other injury sustained prior to the tender of the bond.

TRESPASS — DAMAGES.—In an action of trespass committed by defendant's employees, exemplary damages cannot be recovered, in the absence of proof of malice or wantonness, or culpable inattention and neglect, on the part of defendant in the conduct of his business.

TRESPASS against defendant to recover damages for the unlawful laying of a gas-main through a lot of land belonging to plaintiff. Verdict and judgment for plaintiff. Defendant appeals.

J. C. Doty and J. M. Kennedy, for the appellant.

A. M. Brown, for the appellee.

WILLIAMS, J. The appellant is a corporation clothed with the right of eminent domain. The appellee is the owner of a city lot fronting on Fifty-first Street, in the city of Pittsburgh. In August, 1887, the gas company was engaged in the work of laying its gas-main in Berlin Alley and Fifty-first Street, under the authority of a city ordinance. As the line approached Fifty-first Street it deflected westwardly, and, leaving the alley, entered a small lot belonging to B. and E. A. Darlington, at a point near the line between Darlington and

Keil, followed close to the line for some distance, and when within about twenty feet of Fifty-first Street, crossed over on Keil's lot, and when the line of the street was reached, was about five feet over Keil's line. This the engineer in charge of the line testifies was done by the mistake of the workmen, and was not in accordance with the plan of the company. When the mistake was discovered, the gas company tendered a bond to Keil, which was subsequently approved by the court, and then instituted proceedings to secure the condemnation of the ground occupied by them, and an assessment of the damages sustained by the owner. Pending these proceedings, this action was brought in the month of November following the entry.

The entry, having been made without payment of the damages, or the offer of security therefor, was unauthorized, and trespass will lie to recover for the breach of the close. The subsequent tender of a bond, and proceedings for the condemnation of the land, do not divest the right of action for the trespass, although they transfer the adjustment of the damages necessarily consequent upon the entry under the right of eminent domain from the common-law action to the statutory proceeding. The right to sue, however, vested at the commission of the trespass: *McClinton v. Pittsburg etc. Ry Co.*, 66 Pa. St. 404; and damages for the breach of the close, and for any deprivation of use, or other injury sustained prior to the tender of the bond, are recoverable in this action. But for the permanent injury by reason of the appropriation of part of Keil's lot, and the effect of such appropriation on the remainder, the damages are secured by the bond, and will be assessed in the proceeding instituted for that purpose, and now pending.

We have not been furnished with a copy of the plaintiff's declaration in this case, and we do not know for what items of injury he claimed a right to recover. The claim actually made on the trial we can gather from the evidence upon which the jury were allowed to pass, and on which their verdict rests. From this it appears that no allegation was made of the destruction of buildings, fences, trees, or herbage; on the contrary, the lot was unoccupied and uninclosed, without buildings or improvements, and was open to the public. There was therefore no proof of damage presented, except that which resulted from the mere breach of the close, and that which was done by the actual appropriation. The evi-

dence all related to the permanent injury done by the entry and appropriation.

The plaintiff made a formal offer, on the trial, to prove by witnesses "what was the market value of that lot before this was done, and what was its value with that pipe in, in the manner they put it in." This was objected to, as presenting to the jury the same injury and the same measure of damages which were to be considered and estimated in the pending proceeding for the assessment of damages for the entry and appropriation by the gas company. The learned judge of the court below overruled the objection, and admitted the evidence. This was clearly wrong. The objection was well taken, and the evidence should have been excluded. The injury which it showed the plaintiff to have sustained was that to secure which the bond had been tendered him, and to assess the amount of which proceedings had been begun on the petition of the gas company. The value of the land taken, and the depreciation in the value of that which was left, by rendering its occupancy unsafe, or in any other manner, are questions that must come up and be determined in the proceeding to assess the damages; and to permit the jury to pass upon them in this case is to expose the defendant to the danger of having two judgments rendered against him for one cause of action.

It is urged that this mistake was corrected by the learned judge in his charge to the jury, and ought therefore to be disregarded. He said, speaking of the pending proceeding to assess damages done to the plaintiff: "He will then get full damages for the entire injury to the value of his property. So the plaintiff is entitled, without any question, to damages in the amount you may think this trespass cost him up to the 31st of October. That much he must have under the law." This is a correct statement of the law; and if the incompetent evidence covered by the first assignment of error had not been before the jury, it would have been an adequate instruction. But the incompetent evidence was before them, and there was no other proof of injury, except that resulting from the mere breach of an uninclosed close. It was not withdrawn from them, nor were they cautioned to leave it out of consideration in making up the damages. They were instructed simply to "give the plaintiff compensation for the trespass upon his rights up to October 31st, whatever you think that is. All after that will be tried in the other case, how much this pipe has dam-

aged him, and cannot be tried in this after October. For the injury up to that time you must give compensation." As there was no proof of other items of damage done, and no instruction turning the attention of the jury away from the incompetent testimony before them, the jurors would naturally understand that they were at liberty to consider it, and from it estimate the injury sustained by the plaintiff. Their attention should have been drawn to the trespass and its immediate consequences, as distinguished from the injury resulting from the appropriation of a part of the plaintiff's lot, and the consequent depreciation in value of the part not appropriated.

The instruction on the subject of exemplary damages was both indefinite and inadequate. The court presented this subject to the jury in this manner: "The learned counsel for defendant contends that this was nothing but an ordinary going upon a man's land, cutting a ditch, and putting a pipe down, without any intention to do any harm, or without doing more than ordinary damage; that there was no wantonness." He then stated the position of the plaintiff thus: "On the other hand, the learned counsel for plaintiff contends that the evidence shows maliciousness, grossness; that the outrage was gross; and he puts it on this ground, and it is for you to judge." But jurors ought to dispose of questions submitted to them upon the evidence, and in accordance with certain general rules that should govern them in its application. What evidence was there in this case to show malice on the part of this gas company or its officers? Did a mistake of the laborers engaged in laying the pipe show malice on the part of their employer? Was the gas company to be punished for the trespass of its employees, committed without its knowledge, and against its instructions, by imposing smart-money on it? The jury were left with no more definite information on this subject than they could gather from the direction, "it is for you to judge." Unless there was evidence showing the purpose of this company to oppress or injure the plaintiff unnecessarily, or at the least showing culpable inattention and neglect in the conduct of its affairs, resulting in an unnecessary injury to the plaintiff, there was no reason for imposing exemplary damages. The ends of justice are fully met, under ordinary circumstances, when the employer makes full compensation for the trespass of his employee, without subjecting him to punishment for his employee's malice or cruelty.

The judgment is reversed, and a *venire facias de novo* awarded.

THE PRINCIPAL CASE is distinguished from the case of *Oliver v. Pittsburgh etc. R. R. Co.*, 131 Pa. St. 408, ante, p. 814, in which case trespass was decided not maintainable by the land-owner, inasmuch as he had consented to the entry of the railroad company, and acquiesced in its expenditure of large sums of money upon the land in the construction of its road.

EMINENT DOMAIN — TRESPASS. — Payment of damages, or security therefor, is a condition precedent to taking land by corporations for public use, and if they take the land without payment or security therefor, they are trespassers: *McAuley v. Western etc. R. R. Co.*, 33 Vt. 311; 78 Am. Dec. 627, and note.

DAMAGES — EXEMPLARY — INJURIES TO PROPERTY. — Exemplary damages are allowable for injuries to property only when fraud, malice, oppression, or other aggravating circumstances accompany the injuries: *Merrill v. Tariff Mfg. Co.*, 10 Conn. 384; 27 Am. Dec. 682, and extended note.

RUMMEL v. DILWORTH, PORTER, AND COMPANY.

[131 PENNSYLVANIA STATE, 509.]

MASTER AND SERVANT — RISKS ASSUMED, AND RIGHT TO INSTRUCTIONS

RELATING THEREON. — A servant assumes the risks ordinarily incident to his employment but he has the right to expect his employer to provide machinery, tools, and appliances reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous, or such defect or danger is apparent.

MASTER AND SERVANT — DUTY TO PROTECT YOUNG SERVANTS. — It is the duty of the master to take notice of the age and ability of young servants, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed.

MASTER AND SERVANT — INSTRUCTIONS AS TO RISKS QUESTION OF FACT. — If a young servant employed in one capacity is injured while performing a different and more dangerous duty, which should have been performed by another and older servant, it is a question of fact for the jury whether the young servant had been sufficiently warned and instructed as to the dangerous employment, and whether the master had done all that was reasonably necessary to protect the servant.

MASTER AND SERVANT — RISKS ASSUMED BY SERVANT. — A servant must know the dangers of his employment, by actual experience in the employment, or by instructions of his master, before he can be held to have assumed them.

MASTER AND SERVANT — RIGHT OF SERVANT TO PROTECTION. — The scope of duty within which a servant is entitled to protection is to be defined, by what he was employed to perform, and what, with the knowledge and approval of his master, he did perform, rather than by the verbal designation of his position and employment.

CASE by George Rummel, Jr., by his next friend, George Rummel, against defendant, to recover for personal injuries. Plaintiff, when about seventeen years of age, went to work as a "drag-down" in the mill of defendant. It was his duty to drag heated billets of iron from a furnace to a train of ten

pairs of continuous rolls, by means of which they were converted into material for spikes. Two drag-downs served each pair of rolls, and they were required to move with rapidity. Between each pair of rolls was a space called a gate, consisting of two bars of metal standing upright and fastened to the floor by hinges. The bars were kept in place by a chain, tightly drawn at the top from one to the other, and they held between them small rollers, on which the billet moved on its passage from one pair of rolls to another. Sometimes a billet would stick, by failing to reach the rollers on the gate. It then became necessary to make an adjustment, by loosing the chain from the top of the bars, so that the billet would be caught, and carried on its way, or removed, after which the workman must reach over the cog-wheels which operated the rolls, and with both hands catch the bars, draw them together, and replace the chain. Four days after plaintiff had gone to work in the mill, a billet stuck at the gate between the first and second pair of rolls, and in attempting to make an adjustment, his leg was caught in the cog-wheels, and so crushed that it had to be amputated. On the part of plaintiff, it is claimed that, in addition to his duty as drag-down, he was permitted and accustomed, with the knowledge and permission of the roller-boss, both in his absence and when he was present, to make such adjustments, and that he had never been warned of the extreme danger in so doing. On the part of defendant, it was claimed that the operation of the rolls was turned over by defendant to men known as roller-bosses, with a force employed by themselves; that defendant had nothing to do with such employees as plaintiff, whose sole duty as drag-down was to assist in taking the billet from the furnace to the rolls, when it became the duty of the roller-boss or his assistants to superintend its passage through the train of rollers; that plaintiff had been cautioned not to go in at the gate, and make adjustments, and that he was familiar with the danger at the time of the accident. Verdict and judgment for plaintiff, and defendant appeals.

John Dalzell and William R. Blair, for the appellant.

A. M. Watson, for the appellee.

No. 90.

WILLIAMS, J. This case was first brought into this court several years ago by the plaintiff, against whom a compulsory

nonsuit had been entered in the court below. The judgment of nonsuit was reversed, and the case sent back for trial: *Rummell v. Dilworth*, 111 Pa. St. 348. On the next trial, a verdict was rendered in favor of the plaintiff. The pending writ of error was sued out by the defendants, who complain, not that the court below failed to follow the rule laid down by this court, but that the rule should be reconsidered and modified. We were so much impressed by the importance of the subject, and so desirous to correct any error into which we might have fallen, that a reargument was ordered by this court of its own motion. That reargument has taken place, and we have had the benefit of a clear and able discussion of the questions on which we are asked to modify the opinion expressed when the case was here before.

These questions are two in number: 1. Was not the danger of injury from the cog-wheels in which the plaintiff's leg was crushed a danger incident to his employment, the risk from which he assumed when he entered upon his work? 2. If the first question is not answered affirmatively, then, was not the injury received in the performance of an act which it was not his duty to perform, and the risk from which was for that reason self-imposed? We will consider these questions in their order.

The general rule that a workman assumes the risks incident to his employment when he enters upon it is well settled, but its application is subject to certain qualifications. He certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has the right to suppose that his employer has provided such guards and means of protection from injury in the use of the machinery, tools, and appliances as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant on their absense, unless such absense is apparent, or his attention has been called to it. If the business is one with which he is not familiar, he has a right to expect that its dangers will be pointed out to him, and that he will be instructed in those things necessary for him to know in order to his own safety. He cannot be held to assume the risk of dangers of the existence of which he has no knowledge. In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use

ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. The duty in such cases to warn and instruct grows naturally out of the ignorance or inexperience of the employee, and it does not extend to those who are of mature years, and who are familiar with the employment and its risks.

In the present case, Rummel was a lad of about seventeen years, with very little acquaintance with the business or its dangers. He went into the employ of the defendants on Tuesday. He left on Friday of the same week with a leg so crushed that immediate amputation was necessary. He was employed as a "drag-down," but was hurt while performing the duties of a "roller," in opening and closing the gate between the first and second pairs of rollers. The cog-wheels by which the rollers were moved were covered along the whole length of the train, except at the point over which Rummel had to reach to open and close the gate. If they had been covered at that point, the accident could not have happened. In view of the youth and want of experience in the business on the part of Rummel, it was necessarily a question for the jury whether his employer had sufficiently warned and instructed him about the dangers of the employment, and how to avoid them, or had done all that was reasonably necessary to protect him from injury. This is what is meant by the passage from the opinion of this court, found in *Rummel v. Dilworth*, 111 Pa. St. 343, to which exception is taken. It was not meant to assert that the dangerous character of a piece of machinery, a bridge, or an effort to cross a railroad track in front of a moving train, should be determined by the result of an experiment in each case, but that a workman must know the dangers of his employment by actual experience in the employment, or by the instructions of his employer, before he can be held to have assumed them. In other words, it is not just to the employee to hold him to have assumed dangers of which he has no knowledge by experience in the business, or by the warning and instruction of his employer. Such risks cannot be estimated, because they are not known to exist, or because their real character and extent can only be known by familiarity with the business, or information from one who has such familiarity. The court could not declare, therefore, as matter of law, on the facts of this case, that the danger from which Rummel suffered was one the risk of which he assumed when he accepted employment as a drag-down.

Our second question grows out of the answers complained of in the fifth and sixth assignments of error. As we have already had occasion to remark, Rummel was employed as a drag-down. He was hurt while in the discharge of the duties of a roller, and the court was asked to say that in attempting that for which he was not employed he voluntarily assumed the risk incident to his unnecessary undertaking. If the facts presented a case such as is thus assumed, it may be that the rule invoked should have been given to the jury; but the learned judge of the court below well said that "the scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of his employer, he did perform, rather than by the verbal designation of his position." If, in the absence of the roller, he was permitted and expected to open the gate in case the billet stuck fast, he was entitled to instruction and protection in the same manner as though he had been employed as a roller. Whether he was permitted and expected to manage the gates in the absence of the roller was a question of fact. If the jury found that he was, then the defendants were not entitled to the instruction asked for in their third point, and the answer complained of was right.

On examination of the whole case, we are of opinion that the judgment must be affirmed.

No. 91.

WILLIAMS, J. The judgment in this case is affirmed.

MASTER AND SERVANT—RISKS ASSUMED BY THE SERVANT.—As to what risks are and what risks are not assumed by a servant upon entering upon his service, see *Myers v. Hudson etc. Co.*, 150 Mass. 125; 15 Am. St. Rep. 176, and note; *McDonald v. Chicago etc. R'y Co.*, 41 Minn. 439; 16 Am. St. Rep. 711.

MASTER AND SERVANT—MACHINERY.—As to the duty incumbent upon the master to furnish safe machinery, see *McDonald v. Chicago etc. R'y Co.*, 41 Minn. 439; 16 Am. St. Rep. 711, and note.

MASTER AND SERVANT—MINOR EMPLOYEES.—As to what risks are taken by minor employees, and the master's duty to instruct such employees, see *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; 15 Am. St. Rep. 596, and cases cited in note.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

STATE v. BARNES.

[32 SOUTH CAROLINA, 14.]

CONDITIONAL PARDON.—A pardon granted a party sentenced to two years' imprisonment after he has served part of his term, on "condition that he shall leave the state within forty-eight hours, never to return," is not illegal, and upon his return six years after having accepted the benefit of the pardon, he may be recommitted to prison, to serve the remainder of the unexpired term.

M. H. Moore, for the appellant.

Nelson, for the respondent.

McIVER, J. In this case, the appellant, having been convicted of grand larceny, was sentenced to imprisonment at hard labor in the penitentiary for the term of two years. After suffering a portion of the punishment thus imposed, the appellant was pardoned by the governor, "upon condition that he shall leave the state within forty-eight hours, never to return." An affidavit having been submitted to the court of sessions, to the effect that appellant had violated the condition of his pardon, by returning to the state, a rule was issued requiring him to show cause why he should not be remanded to the penitentiary to serve out the balance of the sentence which had been imposed upon him. The appellant appeared, and made return,—1. That he had been pardoned by the governor; 2. That his term of imprisonment under the sentence of the court had expired. The circuit judge adjudged the return insufficient, and ordered that appellant be remanded to the penitentiary to serve out the balance of the sentence originally

imposed upon him. From this adjudication and order, defendant appeals upon two grounds, as follows: "1. That the condition of the pardon granted the defendant by the governor of South Carolina on December 24, 1883, was illegal and void, while the pardon itself remains absolute, and that his honor erred in holding otherwise; 2. That the term of imprisonment to which the defendant was sentenced, in 1883, has expired, and that his honor erred in holding otherwise."

Inasmuch as our constitution, by section 11 of article 3, expressly invests the governor with power to grant pardons after conviction, except in cases of impeachment, "in such manner, on such terms, and under such restrictions as he shall think proper," it will not be necessary to look further for his authority to grant a conditional pardon, though it seems to be well settled that such a pardon could be granted in that country from whence we derive a large part of our legal principles: 1 Chitty's Crim. Law, 773; 1 Bishop's Crim. Law, 6th ed., sec. 914. These authorities show that a pardon may be granted, either upon a precedent or a subsequent condition. If the former, then the pardon does not take effect until the condition has been performed; but if the latter, then the pardon takes effect at once, but becomes void whenever the condition is violated, and the offender may be again brought to the bar, and remanded to suffer his original sentence.

But while this is conceded, it is contended that a pardon granted upon a condition subsequent which is illegal, immoral, or impossible to be performed, becomes an absolute pardon, such a condition being absolutely void; and the contention in this case is, that the condition upon which the pardon here was granted — to leave the state, never to return — was illegal, inasmuch as there is no such punishment known to our laws as that of banishment, or transportation for life or a period of years. Inasmuch as we think it quite clear that the condition annexed to the pardon granted in this case was neither illegal, immoral, nor impossible to be performed, we need not consider what would be the effect of annexing such a condition to a pardon. It is not pretended that the condition here in question was either immoral or impossible to be performed; and the fact that our laws do not prescribe banishment from the state, or transportation for life or for a period of years, as the punishment for any offense, cannot have the effect of making the condition imposed in this case illegal. There is no law, so far as we are informed, which forbids the executive

from annexing, as a condition of a pardon granted by him, a provision that the offender shall leave the state and never return; and in the absence of any such law, we do not see how the condition upon which the pardon was granted in this case can be regarded as illegal.

So far from there being any law forbidding the imposition of such a condition as was annexed to the pardon granted in this case, we find that its legality has been frequently recognized in this state. In *State v. Fuller*, 1 McCord, 178, the defendant, who had been convicted of a mere misdemeanor, was pardoned upon condition that she would leave the state in the course of two weeks; and upon her failure to comply with the required condition, she was brought up for sentence, and the court held that the pardon upon which she relied was void for want of compliance with the condition upon which it was granted. That is a much stronger case than this, for there the defendant was a married woman, and it was contended that she could not perform the required condition without the consent of her husband. But the court held that the condition was one that was capable of performance, and a failure to perform it rendered the pardon void. In *State v. Smith*, 1 Bail. 283, 19 Am. Dec. 679, the foregoing case was expressly recognized, and it was there held that the governor may annex to a pardon a condition that the offender shall leave the state and never return; and if any part of the condition is violated, the pardon is forfeited, and execution of the original sentence will be enforced by the court of sessions. In that case, the whole subject is fully and most ably discussed by that eminent judge the late David Johnson. Again, in *State v. Addington*, 2 Bail. 516, 23 Am. Dec. 150, the same doctrine was held, upon the authority of *State v. Smith*, 1 Bail. 283, 19 Am. Dec. 679, which was expressly recognized and affirmed. And again, in *State v. Chancellor*, 1 Strob. 347, 47 Am. Dec. 557, the same rule was laid down. In view of these repeated and direct adjudications in this state, we do not think that the question can any longer be regarded as open for discussion.

As to the second ground of appeal, we think the authorities above cited show that it cannot be sustained. While it is quite true that the term of two years' imprisonment, to which the defendant had been sentenced in 1883, has long since expired, yet it is equally true that the defendant has not yet suffered imprisonment for that length of time; and as the pardon

which he pleads has been adjudged insufficient to relieve him from suffering the whole punishment originally imposed upon him, it follows, necessarily, that he is still liable to be required to complete the term of imprisonment originally imposed, just as if he had escaped during that term. And such is the clear result of the authorities, both English and American.

The judgment of this court is, that the judgment of the circuit court be affirmed.

CRIMINAL LAW — CONDITIONAL PARDONS. — For a discussion of the law relative to conditional pardons and the rights arising thereunder, see note to *State v. McIntire*, 59 Am. Dec. 576-578. A prisoner pardoned on condition of leaving the state, by returning is remitted to his original sentence: *State v. Chancellor*, 1 Strob. 347; 47 Am. Dec. 557, and note 559, 560. But in *People v. Moore*, 62 Mich. 497, the court held otherwise, laying down the rule that a pardoned criminal charged with having violated the conditions of his pardon must be arrested and tried in the same way as are other men charged as violators of the law.

SNELLING v. LAMAR.

[82 SOUTH CAROLINA, 72.]

ESTATE IN TRUST — TERMINATION OF — OPERATION OF STATUTE OF USES. —

Where an estate is conveyed to one for the use of or in trust for another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in him, it will pass at once to the *cestui que trust* by operation of the statute of uses. If there is anything remaining for the trustee to do which renders it necessary that he should retain the legal title in order to fully perform the duty imposed by the trust, then the statute will not execute the use, and the legal estate will remain in the trustee.

ESTATE IN TRUST — TERMINATION OF — OPERATION OF STATUTE OF USES —

DEED TO DEFEAT CONTINGENT REMAINDERS. — Where an estate is conveyed in trust for the sole use of a married woman during the lives of herself and husband, and if she survives, then for the use of herself and her children then living so long as she remains the widow of such husband, and upon her remarriage or death, to be divided between her surviving children and the issue of such as were dead, the trust is terminated by the death of the husband, and thereupon the statute executes the use in the surviving widow and children, and their joint deed of feoffment with livery of seisin will defeat the contingent remainders, and vest a good title in the grantee.

LIFE ESTATE. — ESTATE GIVEN DURING WIDOWHOOD vests a life estate determinable upon remarriage.

Croft and Chafee, O. C. Jordan, and John B. Cloy, for the appellants.

Henderson Brothers, for the respondents.

McIVER, J. The plaintiffs brought this action to recover possession of an undivided interest in a tract of land now in possession of defendants. The facts out of which the controversy arises are not disputed, and may be stated substantially as follows: On the 16th of January, 1843, one Charles Holley, conveyed the land now in question, together with other property, to certain trustees, in trust for the sole and separate use of Catharine Holley, the wife of Wade Holley, "for and during the joint lives of her, the said Catharine Holley, and her husband, the said Wade Holley; and in the event that she, the said Catharine Holley, should survive her said husband, Wade Holley, then the said . . . trustees are to hold all said property, real and personal, and the increase as aforesaid, to and for the use, benefit, and behoof of her, the said Catharine, and such children as she may then have living by the said Wade Holley, for, during, and so long as she shall live, or remain a widow of the said Wade Holley; and upon her death or intermarriage, whichever event shall first occur, then, and in that case, all of said estate and property and increase aforesaid are to be equally divided, share and share alike, between and among such children as she, the said Catharine, shall then have and leave living by the said Wade Holley, and the issue of such child or children as may be then deceased," the division to be *per stirpes*, and not *per capita*.

Wade Holley predeceased his wife, Catharine, and after his death, to wit, on the 7th of March, 1871, she, with her sons C. P. Holley, G. W. Holley, and Lucius A. Holley, together with the daughter, Cornelia C. Snelling, and Cornelius S. Snelling, the husband of the daughter, made a deed of feoffment, with livery of seisin, for the land in controversy, to another son, Christopher C. Holley, who conveyed the same to Walker, and he in turn conveyed to the defendant Carrie V. Lamar, the other defendant, Pinckney, being her tenant. About the same time, other deeds of feoffment, with livery of seisin, were made to the other children of Catharine Holley for portions of the tract of land embraced in the trust deed, probably for the purpose of thus making partition of the tract amongst the parties who, it was supposed, would be entitled thereto. After these deeds of feoffment were made, and before the death of Catharine Holley, the said Cornelia C. Snelling departed this life, leaving as her only issue the plaintiffs herein, and upon the death of Catharine Holley they have

brought this action, claiming as remaindermen under the trust deed.

The circuit judge held that while the legal estate remained in the trustees during the joint lives of Wade Holley and his wife, Catharine, in order to preserve the separate estate of the wife, yet upon the death of the husband there was no longer any necessity for the legal estate to remain in the trustees, as they no longer had any duty to perform which rendered it necessary for them to retain the legal estate, and therefore that the same, by the operation of the statute of uses, passed to Catharine Holley and her children then living, who thus became vested with a legal estate for the life of Catharine in the property in dispute, and their deed of feoffment with livery of seisin defeated the rights of the contingent remaindermen. He therefore rendered judgment that the complaint be dismissed.

From this judgment plaintiffs appeal upon the several grounds set out in the record, which need not be repeated here, as the only legal question really presented is, whether his honor erred in holding that upon the death of Wade Holley the legal estate passed from the trustees to Catharine Holley and her children then living by the operation of the statute of uses; and this is the only question which has been argued here. It is true that the first ground of appeal imputes error to the circuit judge in stating that the land in controversy was conveyed by deed of feoffment, with livery of seisin, to Cornelia C. Snelling, and that from her, through successive conveyances, the same came to the defendant Carrie V. Lamar; whereas in fact the land was conveyed to Christopher C. Holley, as has hereinbefore been stated.

But this is manifestly a mere inadvertence, possibly a clerical error, and is wholly immaterial.

It is well settled that where an estate in real property is conveyed to one for the use of or in trust for another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in the trustee, such estate, by the operation of the statute of uses, will pass at once to the *cestui que trust*, or person for whose use the estate is conveyed; but when there is anything for the trustee to do which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the instrument creating the trust, then the statute will not execute the use, as it is termed, and the legal

estate will remain in the trustee. These principles have been so often determined that it cannot now be necessary to do more than refer to some of the cases in which they have been settled: *Ramsay v. Marsh*, 2 McCord, 252; 13 Am. Dec. 717; *Faber v. Police*, 10 S. C. 376; *Bristow v. McCall*, 16 S. C. 545; *Howard v. Henderson*, 18 S. C. 184; *Ayer v. Ritter*, 29 S. C. 135. So that the practical inquiry in this case is, whether any duty was imposed upon the trustees by the trust deed above mentioned, after the death of Wade Holley, the proper performance of which rendered it necessary that the legal estate should remain in them.

Turning to the deed, we find that in the event Catharine Holley survived her husband, as she did, then "such trustees are to hold all said property, real and personal, and the increase as aforesaid, to and for the use, benefit, and behoof of her, the said Catharine, and such children as she may then have living by the said Wade Holley, for, during, and so long as she shall live or remain a widow of the said Wade Holley; and upon her death or intermarriage, whichever event shall first occur, then, and in that case, all of said estate and property and increase aforesaid are to be equally divided, share and share alike, between and among such children as she, the said Catharine, shall then have and leave living by the said Wade Holley," the issue of any deceased child to represent his, her, or their parent in such division. It is quite manifest that no duties are imposed upon the trustees, nor any discretion vested in them, which rendered it necessary that the legal estate should remain in them, and hence, under the rule above stated, the legal estate passed to the beneficiaries. They were not required to receive the rents and profits of the property, and pay them over to the beneficiaries, nor were they required to divide the property when the time for division arrived, and they were not directed to convey the estate, or the share therein, to the persons intended to be benefited thereby. So far as we can discover, the trustees were not invested with any discretion, nor clothed with any powers whatever; they were simply to hold the property until the time for division arrived.

The fact that the estate of Catharine Holley was limited to her widowhood cannot affect the question. Such a limitation did not render it necessary that the legal estate should remain in the trustees, in order to preserve the succeeding trusts; for, by the terms of the deed, immediately upon the marriage of Catharine, her interest would at once have terminated, and the

estate would have passed directly to the remaindermen, without any act on the part of the trustees, just as it would if her interest had terminated by her death.

The legal estate having thus passed to Catharine Holley and her then living children, their deed of feoffment with livery of seisin defeated the contingent remainders, and vested in their grantee, under whom the defendant Carrie V. Lamar claims a valid title: *Faber v. Police*, 10 S. C. 376; *McElwee v. Wheeler*, 10 S. C. 392.

It is contended, however, that in order to enable a tenant in possession to bar contingent remainders by a deed of feoffment, with livery of seisin, such tenant must be seised of a freehold estate, and that Catharine Holley could not be seised of such an estate, as her interest under the deed was not a life estate absolute, but only on condition that she remained the widow of Wade Holley. But, as is said in 4 Kent's Com. 126, "If an estate be given to a woman *dum sola* or *durante viduitate*, . . . the grantee takes an estate for life, but one that is determinable upon the happening of the event on which the contingency depends."

The judgment of this court is, that the judgment of the circuit court be affirmed.

CONTINGENT REMAINDERS, HOW BARRED, DEFEATED, OR CONVEYED.—As a contingent remainder depends upon a particular estate to support it until the happening of the condition upon which it vests, it resulted at common law that if the particular estate was defeated or destroyed in any manner before the happening of the contingency, the remainder was defeated or barred. In early times, in England, various means were resorted to to defeat the particular estate, and thus extinguish the contingent remainder before it vested; for example, if the tenant for life, with a contingent remainder expectant upon his estate, made a feoffment with livery of seisin, the remainder was destroyed, the reason in this case being that as the feoffment conveyed a fee, the attempt of the tenant to convey a larger estate than he possessed simply resulted in his losing his estate and conveying nothing to his feoffee. The particular estate thus being effectually destroyed, the contingent remainder depending upon it was also defeated. So if the life tenant suffered a fine or common recovery of his estate, this extinguished the contingent remainder dependent thereon: *Archer's Case*, 1 Coke, 66; *Chudleigh's Case*, 1 Coke, 137 b; *Davies v. Gatacre*, 5 Bing. N. C. 609; *Penhey v. Harrell*, 2 Freem. 213; *Parker v. Carter*, 4 Hare, 409. A surrender by the tenant for life of his estate operated to destroy the contingent remainder: *Thompson v. Leach*, 2 Salk. 427. A merger of the particular estate will, in some cases, exterminate the contingent remainder. Thus if the particular tenant surrenders to the reversioner or ultimate remainderman in fee, or if he acquires the reversion without a vested intervening estate, the intervening contingent remainder will be defeated: *Penhey v. Harrell*, 2 Freem. 213; *Archer's Case*, 1 Coke, 66 b. Where the particular estate and the contingent remainder are created by devise, and

the particular tenant subsequently acquires the reversion by purchase or by descent from the heir of the testator, a merger results, and the contingent remainder is defeated: *Crump v. Norwood*, 7 Taunt. 362; *Edgerton v. Macey*, 3 Com. B., N. S., 338; *Plunkett v. Holmes*, 1 Lev. 11; *Purefoy v. Rogers*, 2 Sand. 386; *Doe v. Scudmore*, 2 Bos. & P. 294. Or if the particular estate is upon condition, and before the remainder has vested the condition is broken, and entry is made by the reversioner for the breach, the particular estate is defeated by forfeiture, and the contingent remainder also extinguished: *Cogan v. Cogan*, Cro. Eliz. 360; *Sheffield v. Orrery*, 3 Ait. 232.

The technical rules of the common law have, to a very limited extent, been applied to cases in the United States. Thus the one last above stated was applied in *Williams v. Angell*, 7 R. I. 145, where the court decided that the liability of the life estate to forfeiture for the non-payment of an annuity charged upon it, though the liability exists before the birth of issue of the life tenant, does not destroy the life estate so as to cause the remainder to issue to fail for want of an estate of freehold to support it; but in order to destroy the life estate, there must be an entry for condition broken, or claim by the heirs, for the purpose of avoiding it. In Pennsylvania, it has been determined that the tenant for life may destroy the contingent remainder by forfeiting his estate by means of suffering a fine or common recovery: *Lyle v. Richards*, 9 Serg. & R. 322; *Dunwoodie v. Reed*, 3 Serg. & R. 434; *Abbott v. Jenkins*, 10 Serg. & R. 296. In South Carolina, as is shown by the principal case, a contingent remainder held under a devise may be defeated by a feoffment with livery of seisin from the tenant for life: *McEtwae v. Wheeler*, 10 S. C. 392; *Faber v. Police*, 10 S. C. 376; *Redfern v. Middleton*, 1 Rice, 459. The same rule seems to prevail in New Hampshire (*Dennett v. Dennett*, 40 N. H. 498), where it is said that fine or feoffment will have this effect. In such case, a release of the right of entry from the heir of the testator in connection with the feoffment conveys a perfect title to the feoffee: *Redfern v. Middleton*, 1 Rice, 459; *Faber v. Police*, 10 S. C. 376.

If the conveyance by the tenant for life is by any form deriving its validity from the statute of uses, it does not destroy the contingent remainder dependent upon it. It passes only what the tenant may lawfully convey: *Dennett v. Dennett*, 40 N. H. 498, following the common-law rule, as laid down in *Smith v. Clifford*, 1 Term Rep. 744, that a bargain and sale or lease and release by the tenant for life will not destroy the contingent remainders dependent on the particular estate, because such conveyances only transfer what the party seized may lawfully convey, and therefore do not divest nor destroy the particular estate.

Though formerly the rule prevailed that a contingent remainderman could not alienate his remainder, because it was rather a possibility than an estate, it is now well settled, even in those states where the common-law rule still prevails, that where the contingency upon which the remainder is to vest is not in respect to the person, but the event, where the person is ascertained who is to take if the event happens, he may grant or devise the remainder, and the grantee or devisee will come into the title of the remainderman with his chance of having the estate: *Putnam v. Story*, 132 Mass. 205; *Whipple v. Fairchild*, 139 Mass. 263; *Hennessy v. Patterson*, 85 N. Y. 91; *Kenyon v. See*, 94 N. Y. 563; *Roundtree v. Roundtree*, 26 S. C. 450. If, however, the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, the remainderman has no interest which he can transmit either by deed or devise: *Putnam v. Story*, 132 Mass. 205; *Whipple v. Fairchild*, 139 Mass. 263; *Roundtree v. Roundtree*, 26 S. C. 450. In the

case first given, where the individual to take is certain, his interest will pass to his assignee in bankruptcy or insolvency: *Belcher v. Burnett*, 126 Mass. 230; *Minot v. Tappan*, 122 Mass. 535; and equity will apply such interest to the payment of the remainderman's debts by selling it: *Daniels v. Eldredge*, 125 Mass. 358.

A deed of a contingent remainder, if made with covenants, and for an adequate consideration, will be supported in equity as an executory contract for a deed when the estate becomes vested, and such interest in the contract may be devised by the person who owns it, so as to vest in his heirs: *Bailey v. Hoppin*, 12 R. I. 560. At common law, however, before the contingency happened, the remainder could not be conveyed, except by way of estoppel, since it was considered that the remainder was not an estate, but a mere chance of having one. Thus if the remainderman, during the continuance of the particular estate, seeks to convey his interest by quitclaim deed, he will not be estopped from claiming the remainder when the contingency happens; still, if he makes a deed during the existence of the particular estate, purporting to convey his contingent interest, and in the deed covenants against all claims made by or under him, he will be estopped by his covenant to claim the land at the termination of the particular estate, and the estoppel will operate to convey the remainder to his grantee: *Robertson v. Wilson*, 38 N. H. 48.

"It was to guard against the possibility of any tortious acts on the part of the tenant of the particular estate defeating the contingent remainder dependent upon it that the scheme of 'trustees to preserve contingent remainders' was devised. The effect of this was, to have some one with a vested remainder competent at any moment to take and hold the particular estate for the balance of the term of its original limitation, if the first tenant thereof were to defeat his own estate by forfeiture or other act, or if his estate and the inheritance were to merge so as otherwise to destroy it": 2 Washburn on Real Property, 5th ed., 639. In speaking of the operation of this method of preserving the contingent remainder, Mr. Tiedeman says: "It was by interposing between the particular estate and the contingent remainder a vested remainder in trustees, as it was called, 'to preserve the contingent remainders.' For example, the limitations would be to A for life, remainder during the life of A to trustees to preserve contingent remainders, remainder to the heirs of B. If by any act of his, A's estate is defeated, whether it be by disseisin, merger, feoffment, or the breach of a condition attached to his estate, the vested remainder to the trustees will take effect in possession; and since their estate is a trust, they cannot in any way defeat it. It continues to exist, under all circumstances, until the natural period of its limitations has expired": Tiedeman on Real Property, sec. 424. Under this method of preserving the contingent remainders, trustees to support them joining with the tenant for life in destroying them are guilty of a breach of trust, and the purchaser with notice of the trust is liable to make good the estate: *Gorges v. Pyc*, 7 Brown Parl. C. 221; *Mansell v. Mansell*, 2 P. Wms. 678. This is especially the case if the remainderman has not attained the age of twenty-one years: *Moody v. Walters*, 16 Ves. 283. Still, if he has attained that age, the trustee may join him in a common recovery to defeat the contingent remainder, and this will not constitute a breach of trust nor furnish ground for the refusal of specific performance: *Biscoe v. Perkins*, 1 Ves. & B. 485; *Moody v. Walters*, 16 Ves. 283. Where the tenant for life, under a will with remainder in tail, is also made a trustee to preserve contingent remainders over, he is not guilty of a breach of trust by

joining with the remainderman in tail to destroy remainders over: *Osbrey v. Burg*, 1 Ball & B. 58. Where the trustee joins with the *cestui que trust* in a conveyance to bar the entail, it is no breach of trust; for it is no more than he may be compelled to do, though the trustee himself might have barred such entail without his joining, and that not only by fine or recovery, but also by feoffment, bargain and sale, devise, or surrender: *Goodrick v. Brown*, 1 Cas. Ch. 49; *Digby v. Langworth*, 1 Cas. Ch. 65; *Washburn v. Deems*, 1 Cas. Ch. 213; *North v. Chammerswood*, 2 Cas. Ch. 64-78. Where a settlement was made by a third person to the use of a husband for ninety-nine years, remainder to trustees during his life, remainder to the wife for life, remainder to the first son of the marriage, remainder to the heirs of the body of the husband, with other remote remainders over, there was no issue of the marriage, and the court refused to punish the trustees for joining in a conveyance to cut off the remainders at the suit of a remote remainderman: *Tipping v. Piggot*, Gilb. Ex. 34.

The rules of the common law, and those which arose under trusts to preserve contingent remainders by which the latter might be barred and defeated, are now rendered obsolete in England by the passage of the statute 8 and 9 Victoria, chapter 106, sections 6-8, under which, when it is ascertained who is to take as contingent remainderman, he may convey his interest by deed; and also providing that the particular estate upon which the contingent remainders depend shall not be destroyed or terminated by the act of the particular tenant so as to bar the remainder. The only way in which the particular estate can be determined is by the expiration of the period of natural limitation. The wording of this act, passed in 1845, is, substantially, that a contingent remainder existing or created before its passage shall be deemed capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened: Quoted in *Harris v. McElroy*, 45 Pa. St. 221. The same rules now prevail in nearly all of the states of the American Union under statutes of similar import enacted to prevent the defeat of the contingent remainder before the happening of the contingency upon which the vesting of the remainder is made to depend by alienation or other act of the particular tenant. Among those states having statutes to prevent the defeat of the contingent remainder by alienation or act of the owner of the precedent estate, and also to prevent its defeat by preventing the destruction of the particular estate by disseisin, forfeiture, surrender, or merger, may be mentioned Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New York, Texas, Virginia, and Wisconsin: 2 Washburn on Real Property, 5th ed., 639, 640, 643 et seq.; Tiedeman on Real Property, sec. 422, note, sec. 424.

The same rule now prevails in Pennsylvania. In *Harris v. McElroy*, 45 Pa. St. 216, the facts were, that a married woman joined her husband in conveying her real estate by deed to a trustee in trust for her use during life; at her death, in trust for her husband during life; and upon the death of the survivor, for the use and benefit such of her children as should be then living, and the issue of those deceased, their heirs and assigns, in equal shares, as tenants in common; and in case of her death without leaving any child or children, then in trust for her right heirs. The court determined that she took a life estate only, that her children took a contingent interest capable of sale, assignment, or devise, and that upon the purchase of her husband's interest she could not compel a conveyance of the fee to her from the trustee so as to enable her to destroy the contingent remainders. In Kentucky, Michigan,

Minnesota, New York, and Wisconsin, statutes prevail which make contingent remainders descendible, devisable, and alienable in the same manner as estates in possession: 2 Washburn on Real Property, 5th ed., 645. The New York statute has been construed to this effect: *Miller v. Emans*, 19 N. Y. 384; *Moore v. Littel*, 41 N. Y. 66; *Mott v. Ackerman*, 92 N. Y. 539-549; *Ham v. Van Orden*, 84 N. Y. 257; *Dodge v. Stevens*, 105 N. Y. 588. The Kentucky statute has been so construed in *Fall City Real Estate Ass'n v. Vankirk*, 8 Bush, 549. In Maine and Massachusetts, under the statute, when a contingent remainder is so granted or limited to a person that in case of his death before the happening of the contingency the estate would descend to his heirs in *fee-simple*, such person may before the vesting of the remainder sell, assign, or devise it subject to the contingency; and in New Jersey the contingent remainderman may devise, convey, assign, or charge by deed his expectancy, except such as he may have as heir of a living person, or any interest he may acquire by deed thereafter executed, or under the will of a living person: 2 Washburn on Real Property, 5th ed., 645.

HARMON v. COLUMBIA AND GREENVILLE R. R. Co.

[32 SOUTH CAROLINA, 127.]

WITNESSES — COMPETENCY OF NON-EXPERTS TO REPLY TO EXPERT TESTIMONY. — Where, in an action against a railroad company to recover for the killing of cattle on the track, the inquiry become material as to within what distance the train could be stopped, and experts testify on that point, non-experts who propose, in reply, to speak from their own observation and experience on the same subject are competent witnesses, and their testimony should go to the jury.

RAILROADS — LIABILITY FOR KILLING STOCK. — CONTRIBUTORY NEGLIGENCE on the part of plaintiff cannot be inferred from the fact that his stock was killed by a railroad train in his inclosed pasture, through which the railroad ran.

Andrew Crawford, for the appellant.

John C. Haskell, for the respondent.

McIVER, J. This was an action to recover damages for certain cattle belonging to plaintiff, alleged to have been killed by the negligence of the defendant company in running their trains. The appeal imputes error to the circuit judge in ruling out certain testimony offered by plaintiff, or rather in instructing the jury that it had nothing to do with the case, and in charging the jury as to the doctrine of contributory negligence.

It seems that the line of defendant's road ran through the land of plaintiff, and that after the railroad was constructed and in operation, the plaintiff, or one under whom he claimed, had inclosed with a fence a large territory for a pasture for

cattle, which embraced the line of defendant's road where it passed through plaintiff's land. The cattle in question, or at least some of them, were killed in this pasture by defendant's trains, as it was alleged, and one of the questions in the case was, whether the cattle could have been seen on the track at a sufficient distance to enable the engineer to stop his train. This, of course, involved the inquiry within what distance the trains could be stopped. The defendant offered the testimony of several railroad engineers, who were called experts, as to this point. In reply, plaintiff proposed to offer testimony of two witnesses who did not claim to be experts, but who proposed to speak, from their own observation and experience, as to the distance within which a train could be stopped, and their testimony, being objected to because they were not experts, was at first ruled to be incompetent, but was subsequently received, the circuit judge saying that he would instruct the jury that it had nothing to do with the case.

If this testimony was competent, there was not only error, in the first instance, in ruling it out, but also error in instructing the jury that it had nothing to do with the case. For if it was competent, it was for the jury, and not for the judge, to say what effect it should have on the case. We do not see why the evidence was not competent. While it is true that these witnesses may not have been experts in the strict sense of that term, and not therefore entitled to give a mere opinion, yet where a witness who is not an expert states the facts upon which he bases his opinion, the rule does not preclude him from stating his opinion, provided the fact which he states shows his opinion to be correct: *Seibles v. Blackwell*, 1 McMull. 56. But as we understand it, the witnesses in question were not called for the purpose of expressing an opinion as to the distance within which the trains might be stopped, but simply to state facts which they had observed in relation to the stopping of trains; and this, it seems to us, they clearly had the right to do, leaving it to the jury to say what effect such testimony might have.

As to the matter of contributory negligence, the jury were charged as follows: "There is a principle in this law which is called contributory negligence, and if the party complaining is himself negligent, why, the corporation is not liable. The proof, as I remember, which is altogether for you, was, that this pasture was made on this railroad line after the railroad was built; and therefore the question arises, If a land-holder puts his pasture on either side of the line of road, and his

stock is killed, does he not contribute to the injury of which he complains? That is a question which will present itself to you in coming to your conclusion." This, as it seems to us, was a plain intimation, if not an invitation, to the jury, to find that the plaintiff had been guilty of contributory negligence from the simple fact that the line of defendant's railroad, after it was built, had been inclosed by plaintiff's pasture fence. Such we do not understand to be the law. On the contrary, as we said in *Simkins v. Columbia etc. R. R. Co.*, 20 S. C. 263, there is "nothing unlawful in the act of the plaintiff in permitting his stock to roam at large in his inclosed pasture, upon his own land, through which defendant only had the right of way"; and if so, we do not see how it would be possible for the jury to be allowed, much less to be invited, to infer, from the simple fact that the stock of a plaintiff had been killed by a railroad train in his own inclosed pasture, through which the railroad ran, that such plaintiff had been guilty of contributory negligence. While it is quite true that the question whether a plaintiff has been guilty of contributory negligence is a question of fact for the jury, yet where they are instructed that they may infer such negligence from a fact which, standing alone, does not legally warrant such inference, there is error of law.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

WITNESSES — EXPERT TESTIMONY.— An engineer is competent to testify as to the possibility of stopping a train within a certain distance; but a person who has had no experience respecting the stopping of trains cannot testify as to how long it will take to stop one: *Bellefontaine etc. R. R. Co. v. Bailey*, 11 Ohio St. 333; *Manhattan etc. R. R. Co. v. Stewart*, 30 Kan. 226; these cases being cited in a note to *Hammond v. Woodman*, 66 Am. Dec. 243.

RAILROADS — KILLING STOCK.— A railroad neglecting to fence its road is liable to the owner of adjoining lands for injury to his cattle on the track, although he turned them out to graze, knowing of the neglect: *Cressey v. Northern R. R. Co.*, 59 N. H. 564; 47 Am. Rep. 227.

SEIGNIOUS v. PATE.

[22 SOUTH CAROLINA, 134.]

MORTGAGES — MORTGAGOR'S RIGHT TO RENTS AND PROFITS.—Where a mortgagor, after condition broken, makes an assignment of the mortgaged premises for the benefit of creditors, subject to existing liens, the mortgagee in his action to foreclose is not entitled to have a receiver appointed *pendente lite* to collect the rents and profits, to be applied to the payment of the mortgage debt, merely because of the insolvency of the mortgagor and the insufficiency of the premises to pay such debt.

MORTGAGES — EFFECT OF ASSIGNMENT AS TO RENTS AND PROFITS.—An assignment of the mortgaged premises by an insolvent mortgagor, made before foreclosure, and while the rents and profits belong to him, carries with it the right in the assignee to receive and apply the same as provided for in the assignment, although the mortgaged premises are insufficient to satisfy the mortgage debt.

Boyd and Brown, for the appellant.

Ward and Woods, for the respondents.

SIMPSON, C. J. The defendant Levi S. Pate, being indebted to the plaintiff, appellant, or being about to become indebted, for advances and supplies to a large amount, executed a mortgage covering certain lands situated in Darlington and Chesterfield counties to secure the same. Some time after the execution of said mortgage, and after default in the payment of indebtedness thus secured, Pate made a general assignment of his property, both real and personal, "for the benefit of creditors subject, however, to such mortgages and encumbrances as at that time lawfully existed thereon," the said mortgage of the plaintiff then having a legal lien on the said premises. Under this state of facts, the plaintiff instituted the action below to foreclose his mortgage, and in his complaint he alleged that the mortgaged premises were wholly insufficient to pay the mortgage debt, and further, that the defendant Pate, who was personally liable therefor, was wholly insolvent; and in addition to praying foreclosure of the mortgage, he prayed the appointment of a receiver of the rents and profits of the said mortgaged premises, to be applied to his demand; and after answers were put in, he gave notice that upon the record and certain affidavits he would move, before the presiding judge at Darlington, for an order appointing said receiver of said rents and profits of said premises, as set forth in the complaint.

This motion was accordingly made before his honor Judge Norton at the time and place mentioned, who refused it, in a brief order, of which the following is a copy, to wit: "The motion here was to appoint a receiver of rents and profits of real

estate under suit for foreclosure in this action, which the defendant Pate had included in a general assignment to the defendant McKee for the benefit of all creditors of the former, the assignment reserving the rights of any creditors having lien thereon. The plaintiff has an ordinary mortgage upon said real estate, and contends that he has a prior equity to have the rents applied to his mortgage deed in proportion to the rights conveyed to the defendant McKee by the assignment for the benefit of all the creditors of Pate. I think the assignment conveyed the lands along with the rents and profits, subject to the lien of the plaintiff's mortgage in the land itself, to be enforced by a lien under judgment of foreclosure, and the assignee consequently takes the rents up to that time for the purposes of the trust created by the assignment. It is therefore, without consideration of the other grounds argued, ordered that the motion be dismissed, with ten dollars costs."

The plaintiff appealed, raising substantially but one question in his exceptions, to wit, that his honor erred in holding that the assignment by Pate, before the action for foreclosure, deprived plaintiff of the right to have a receiver appointed of the rents and profits of the land; and the defendants gave notice that they would sustain the judgment of the circuit judge, on the ground that there being no stipulation in the mortgage pledging the rents and profits, that the mortgagee had no right thereto until foreclosure.

It will be observed that the demand for the appointment of a receiver of the rents and profits is based upon the allegations in the complaint, that the mortgaged premises were wholly insufficient to pay the mortgage debt, and the insolvency of the defendant Pate. It will be further noticed that the object of having the receiver appointed was, not to preserve the mortgaged premises from waste and destruction, etc., but to have the rents and profits thereof applied to the payment of plaintiff's debt, in addition to the proceeds of said premises upon foreclosure sale. This question brings up for consideration and adjudication the legal rights of mortgagor and mortgagee in the property mortgaged before foreclosure. We suppose it is well settled and well understood by the profession—so well that it is wholly unnecessary to refer to the decided cases—that in this state, since the act of 1791, unlike a common-law mortgage, the mortgagor remains the owner of the land, and that the mortgagee is the owner of the debt, the effect of the mortgage being nothing more than to pledge the land for

the payment of the debt, and to give the creditor a lien thereon to secure said payment. Such being the well-established character and legal effect of a mortgage in this state, under the act of 1791, so long as the mortgagor remains in possession, it would seem to follow, logically and necessarily, that in the absence of any pledge by the mortgagor in the mortgage of the rents and profits, that they would legally belong to the mortgagor, with no claim whatever thereon by the mortgagee in advance of a foreclosure, previous to which the mortgagor would have the right to dispose of said rents as he chose. Otherwise the court would make the contract for the parties, instead of the parties themselves, if it assumed to turn over said rents and profits to the mortgagee, in the absence of any stipulation to that end, or of any pledge thereof.

It is said, however, that there is an equity in favor of the creditor to have the rents and profits sequestrated for his benefit, when it appears that the mortgaged property is insufficient to pay the debt, and the mortgagor is insolvent, and that this equity springs into existence at the time of the execution of the mortgage, and runs with it, to be enforced whenever it becomes necessary, with priority over any subsequent assignment or disposition of said rents by the mortgagor; and Coote and Jones on mortgages are referred to as sustaining this position. We find in Coote on Mortgages (c. 3, p. 332) the following: "That although the mortgagor remains in equity the actual owner of the land until foreclosure, entitling him, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land, with all its produce, as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee."

This much is quoted in appellant's argument, and it is urged that this principle would authorize the sequestration of the rents and profits here; but Mr. Coote, in the next paragraph, states how and where it would operate. He says: "On this principle, equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on bill filed by the mortgagee. But the mortgagee is not, as a matter of course, entitled to an injunction to prevent the felling of timber by the mortgagor. The court must first be satisfied that the security is insufficient." Mr. Jones, however, does lay down the proposition that the prevailing rule in those states in which the legal title is regarded as being in the

mortgagor until foreclosure is, that a receiver will be appointed upon application of a mortgagee after default, etc., whenever sufficient equitable grounds appear, which, in general, are, insufficiency of the property and insolvency of the debtor: Jones on Mortgages, sec. 1517. There is nothing said in this section, however, as to the application of the rents and profits. But in section 1516 he further says a receiver of rents and profits may be appointed *pendente lite*, when the mortgage is insufficient, and the party liable is personally insolvent, or where it is provided by the deed that the mortgagee shall have the rents and profits after default, — saying “that the right to have a receiver of the rents and profits appointed pending the litigation depends upon the general principle of equity that the purpose of such an appointment is to preserve the property so that it may be appropriated to satisfy the decree of the court. A mortgagee, to be entitled to a receiver, must show that it is necessary to interfere with the possession of the mortgagor on account of the inadequacy of the security and the insolvency of the mortgagor. If the mortgagor is doing no injury or waste to the property, and is threatening none, etc., a receiver will not be appointed. This relief is given with great caution, and only when the mortgagee has no other adequate remedy.”

No case from our own reports has been referred to in which the broad equity doctrine claimed by appellant has been recognized; and without determining now whether or not it exists as a general principle, as contended for, we think it could have no application where, as in this case, the mortgagor had already assigned the mortgaged property for the benefit of creditors, subject to the lien of the mortgage. This assignment, made before the suit for foreclosure, and while all rents and profits belonged to the mortgagor until foreclosure, carried with it the right in the assignee to receive and apply the same as provided for in the assignment.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MORTGAGES — RIGHT OF MORTGAGEE TO RENTS AND PROFITS. — A mortgagor suffered to remain in possession of mortgaged premises is not accountable for rents and profits: *Harrison v. Wyee*, 24 Conn. 1; 63 Am. Dec. 151; *Childs v. Hurd*, 32 W. Va. 66. Wherefore if a suit is pending to foreclose a mortgage by the mortgagee, the mortgagor will continue to take the rents and profits during the continuance of the suit, unless the court, by its authority, appoint a receiver to take possession of the property: *Childs v. Hurd*, 32 W. Va. 67.

MOYER v. DRUMMOND.

[32 SOUTH CAROLINA, 185.]

HOMESTEADS — HEAD OF FAMILY. — It is not necessary that the relation of husband and wife, or of parent and child, should exist, in order to constitute a family having a head, within the meaning of the homestead law. The exemption extends to one who has residing with him those so connected with him by blood, or ties of residence and association, as to become part of his household, and who have no residence but that which they enjoy under his favor, and whom he is under a legal or moral duty to support.

HOMESTEADS — HEAD OF FAMILY. — A brother who resides with his sister in her house, the rental value of which is insufficient to support her, and who supports her and manages the household, is the head of a family, and entitled to the chattel exemption allowed by the homestead law.

HOMESTEADS — INTEREST IN PARTNERSHIP EXEMPT. — A partner is entitled to the chattel exemption allowed by the homestead law in partnership assets, as against his individual creditors.

Bomar and Simpson, for the appellant.

R. K. Carson, for the respondent.

McIVER, J. This was a proceeding to subject the interest of defendant in a certain partnership, of which he was a member, to the payment of a debt due by him to the plaintiff, under proceedings supplementary to an execution. Defendant claimed that his interest in said partnership did not amount to the sum of five hundred dollars, and was therefore exempt under the homestead laws of the state. The circuit judge held that the defendant was not entitled to the exemption claimed, for two reasons: 1. Because he was not the head of a family; 2. Because the homestead exemption "is not allowable in partnership property." From this judgment defendant appeals, imputing error to the circuit judge in both of said rulings.

The question whether one is the "head of a family," in the sense of that phrase as used in the homestead law, is a question of law, to be determined from a consideration of the facts in a given case. The question is, What is the legal conclusion to be drawn from the facts presented? To determine this question, it is necessary to consider first what is meant by the phrase "head of a family," as used in the homestead law, and then to inquire whether the facts in a given case bring the applicant within the true meaning of that phrase. The accepted definition of the word "family," as given by lexicographers, and approved in many cases, seems to be, "The collective body of persons who live in one house, under one

head or manager." The number of persons thus living together is not at all important, except that there must be more than one, as it is quite certain that two persons may constitute a family; e. g., husband and wife, father and child.

It is also well settled that it is not necessary that the relation of husband and wife, nor that of parent and child, should exist, in order to constitute a family: *Bradley v. Rodelsperger*, 3 S. C. 226; *Garaty v. Du Bose*, 5 S. C. 493; *Moore v. Parker*, 13 S. C. 486; *Rollings v. Evans*, 23 S. C. 316. But where these relations are absent, we have no case in this state, so far as we are informed, which decides distinctly what other relations existing between persons living together will be sufficient to constitute a family; but as was said by Simpson, C. J., in *Rollings v. Evans*, 23 S. C. 316, the term "family" is not to be taken in a restricted sense, but "in its ordinary sense, which includes persons living in one house, and under one head or manager"; and as was said by Moses, C. J., in *Garaty v. Du Bose*, 5 S. C. 493, "The exemption was intended, not alone as the benefit to the head of the family, but to those whose relations to the head demand, on the one hand, support and protection, and on the other, require a contribution, by the aid of their labor, to the maintenance and conduct of the general establishment to which they belong. . . . It would not follow that although the head of a family might not be a parent, the one substituted as the head would lose the favor of the provision; for it would extend to one having under his roof those so connected with him by ties of residence and association as to become part and parcel of his household, changing their domicile with him, and having no residence but that which they enjoy under his favor."

We do not think that the former chief justice, in using the words "his roof" meant to imply, as is urged by counsel for respondent, that one of the conditions necessary was, that the person claiming to be the head of a family should be the owner of the house in which the collective body of persons alleged to constitute the family resided; for as matter of fact it is well known that many person who are undisputed heads of families reside in houses which they do not own, but which are owned by their wives. Nor do we think that it is necessary that there should be any legal obligation on the part of one claiming to be the head of a family to support the members thereof; but a moral duty, arising from ties of blood, or, possibly, other similar relations, will be sufficient. As is said

in 7 American and English Encyclopædia of Law, page 804, note 2, "the test of a legal duty has been rarely applied, and, unquestionably, a moral duty to support the members of a family is sufficient to constitute one its head"; citing Thompson on Homesteads, sec. 45. Accordingly, we find that it has been held in *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248, that an unmarried woman keeping house, and there bringing up two children of her deceased sister, is the head of a family, though she has taken no steps to adopt said children, under the statute of that state; in *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584, that a brother living with his widowed sister and her four small children, and providing for them, is the head of a family; in *Bailey v. Cumings*, 16 Nat. Bank. Reg. 882, that a bachelor who supports a widowed sister, who keeps house for him, may be the head of a family.

We are inclined to agree with what is said by Anderson, J., in *Calhoun v. Williams*, 32 Gratt. 18, 84 Am. Rep. 759: "The whole theory and policy of the homestead (law) is founded upon the principle that there is a natural and moral obligation on the head of a family to provide for the support of his wife and children, and other persons dependent on him, towards whom he stands almost *in loco parentis*, which is, if not paramount, equal to his obligation to pay his debts. . . . The family may consist of a wife and children, or of other persons who may stand in a state of dependence in the family relation; or it may consist of persons standing in either of these relations, whether the father or mother, or a brother or a sister, or other relation, is the head; but they must be persons who are dependent, in some measure, on the head for support, and who have an interest in his holding his property, and would be prejudiced by its seizure and sale under execution or other process, and who would be benefited by its exemption."

Testing this case by these principles, we think it clear that the defendant must be regarded as the head of a family, and, as such, entitled to the exemption claimed. The undisputed testimony of the defendant is: "My sister and myself live together as one family; have so lived for eight years; she is sickly; she has nothing now but the house and lot; she has no other close relatives except myself; I support my sister, and run the establishment; have one servant hired; my sister is dependent upon me for a support, and I support her as a part of my family." Another witness says: "Drummond and his sister live together; he 'supports her.'" It seems to us clear

that this testimony is quite sufficient to show that these two persons, bearing the close relation of brother and sister, live together as one family; that she is dependent upon him for a support, which he provides for, and that he, as the head of the household, manages and controls, hires the necessary servants, and provides for the table, etc., she, doubtless, keeping house for him, though that fact is not explicitly stated. It is true that the sister owns the house in which they live; but this manifestly would not afford this invalid female the barest support; for the testimony is, that it would not rent for more than twenty-five dollars a year, and she is therefore clearly dependent upon her brother for the means of living.

The only other inquiry is, whether there was error in holding that a homestead exemption is not allowable in partnership property. We see nothing in the constitution or statutes which limits this exemption to personal property held in any particular manner. On the contrary, the language of the constitution, since the amendment of 1880, is very general in its character, and must be regarded as embracing any species of personal property, whether held in severalty or in common, or in any other manner. This is in accordance with the principles decided in *Nance v. Hill*, 26 S. C. 227, and *Mellichamp v. Mellichamp*, 28 S. C. 125, where the right to a homestead in property held in common was recognized. It is true that there may be, as in the cases cited, a practical difficulty in assigning or setting apart to a claimant of such an exemption in partnership property, the particular property exempt; but that difficulty does not present itself in this case.

The judgment of this court is, that the judgment of the circuit court be reversed.

HOMESTEAD — HEAD OF FAMILY. — As to who is the head of a family, see extended note to *Wade v. Jones*, 61 Am. Dec. 586-593.

EXEMPTION — PARTNERSHIP PROPERTY. — Partnership property is exempt from execution, just as individual property is exempt: *St. Louis etc. Foundry v. International etc. Pub. Co.*, 74 Tex. 651; 15 Am. St. Rep. 870, and note. In the case of *Ex parte Kariak*, 32 S. C. 437, *post*, p. 865, the rule is laid down that a partner is entitled to a homestead exemption out of the partnership property, when all the partnership debts are satisfied.

DONAHUE v. ENTERPRISE RAILROAD COMPANY.

[32 SOUTH CAROLINA, 299.]

MASTER AND SERVANT—SERVANT'S KNOWLEDGE OF DANGEROUS AGENCY.—

Ignorance on the part of a servant of the dangerous character of the agency which he is called upon to use is no part of his cause of action for an injury sustained in the use of such agency. Hence, in an action by a street-car driver to recover for an injury from a vicious horse furnished for his use by the company, he need not allege his knowledge or lack of knowledge of the viciousness of the animal.

MASTER AND SERVANT—SERVANT'S DUTY TO KNOW OF DANGEROUS AGENCY.

—A servant suing to recover for personal injury need neither allege nor prove his ignorance or lack of means of knowing that the agency which he was called upon to use was dangerous and unsafe, as it is the duty of the master to know this. That the servant knew or ought to have known the dangerous character of the agency involves his contributory negligence, and is an affirmative defense, imposing the burden of proof on the master.

Barker, Gilliland, and Fitzsimons, for the appellant.

Mitchell and Smith, and W. H. Parker, Jr., for the respondent.

McIVER, J. As the question presented by this appeal arises under a demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it is necessary to set forth so much of the complaint as is pertinent to this inquiry. The first, second, third, fifth, and sixth paragraphs need not be considered, as the allegations therein contained do not relate to the question which we are called upon to consider. The fourth paragraph is as follows: "That at the time of his death, the said John H. Donahue was employed by the defendant as a driver of one of their street-cars on the line of their railroad, in the city of Charleston; that defendant, at said time, to wit, May 24, 1887, carelessly, negligently, and unlawfully furnished to said John H. Donahue, to be driven by him, and ordered and directed him to drive, in one of their street-cars as aforesaid, a vicious, unruly, and unmanageable horse, wholly unfit for the purposes of a street-railroad car-horse, and so known to be to said defendant; and while in performance of his duties as aforesaid, driving said horse in a street-car, under the orders and directions of the defendant, the said John H. Donahue was, then and there, in the city of Charleston, on the 24th of May, 1887, by said vicious, unruly, and unmanageable horse, kicked, struck, and injured, so that he then and there died from the effects of such kicking, striking, and injuring."

The defect in the complaint relied upon to sustain the demurrer was, that it contained no allegation that the intestate did not know, or did not have the means of knowing, equally with the defendant, that the horse was a vicious, unruly, and unmanageable animal. The circuit judge overruled the demurrer, and the defendant appeals, upon the several grounds set out in the record, which, although stated in various forms, substantially make the single question whether the omission to allege that the intestate did not know, or did not have the means of knowing, equally with defendant, the dangerous character of the animal, is fatal to the complaint on demurrer.

There can be no doubt that it is the duty of the master to furnish his servant with safe and suitable appliances to do the work for which he is engaged, and that the neglect of the master to perform this duty renders him liable to the servant for any injury sustained by reason of such neglect: *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262; 44 Am. Rep. 573. It would seem, therefore, that when a servant who brings his action against his master to recover damages for injuries sustained by him, and states in his complaint that such injuries have resulted from the negligence of the master in failing to supply him with safe and suitable appliances to perform the work which he was engaged to do, he has stated a good cause of action; for he has alleged that he has been injured, and that the injury resulted from the default of the master in the performance of his acknowledged duty, and it is difficult to conceive what more could be required. As a test, suppose this case had gone to the jury, and the plaintiff had proved all of the allegations of her complaint, and nothing more had appeared; we do not see how it could be doubted that she would have been entitled to recover.

But it is urged that while the rule as above stated is well settled, yet it is equally well settled that where a servant knows, or ought to know, the unfit and dangerous character of the agency or appliances necessary for him to use in the performance of the work for which he is engaged, and, nevertheless, continues to use such agency or appliance, he voluntarily assumes the risks incident to such use, and if injury results, he cannot recover; and hence it is argued that in an action like the one now under consideration it is necessary for him to allege want of knowledge or means of knowledge. While the rule as thus stated may be admitted to be correct, we do not think it by any means follows that the inference

claimed to flow from it can be drawn from the rule. Ignorance on the part of the servant of the dangerous character of the agency which he is called upon to use constitutes no part of his cause of action for an injury sustained in the use of such agency. It is no part of his duty to exercise due care and diligence in ascertaining whether the agencies furnished him by the master are safe and suitable. That is the duty of the master, and not of the servant: *Lasure v. Graniteville Mfg. Co.*, 18 S. C. 281.

It cannot therefore be necessary for the servant either to allege or prove that he did not know, or did not have the means of knowing, that the agency which he was called upon to use was unfit or unsafe, as it is the duty of the master, and not of the servant, to look after that matter; and hence his want of knowledge does not constitute any part of his cause of action. It is true, that where it is shown, by way of defense, that the servant either knew, or ought to have known, the dangerous character of the agency which he was called upon to use, and still voluntarily continued to use it, his action may be defeated; but that is upon the ground that he has, by his own negligence, contributed to the injury of which he complains. And it is well settled, in this state at least, that contributory negligence is an affirmative defense: *Carter v. Columbia etc. R. R. Co.*, 19 S. C. 20; 45 Am. Rep. 754; *Crouch v. Charleston etc. R'y Co.*, 21 S. C. 495; *Darwin v. Charlotte etc. R. R. Co.*, 23 S. C. 531; 55 Am. Rep. 32. It follows, necessarily, that it is not necessary to negative such negligence in the complaint.

While it is true that the precise question which we are now called upon to consider has never, so far as we are informed, been authoritatively decided in this state, yet we think that the conclusion which we have reached follows necessarily from what has been decided. To adopt the language of Mr. Justice McGowan in *Crouch v. Charleston etc. R'y Co.*, 21 S. C. 495, we think that in cases of this kind "the conduct of the plaintiff is not a necessary element in his cause of action, and to be alleged by him, but a defense to be alleged and proved by the defendant. . . . We think it follows, from the onus of proof being on the defendant, that it is not necessary for the plaintiff to make the allegation of due care in his complaint, and thus anticipate the defense."

The judgment of this court is, that the judgment of the circuit court be affirmed.

MASTER AND SERVANT — INJURY TO THE SERVANT — PLEADING. — A plaintiff suing for injuries, which he claims to have sustained through defendant's negligence, need not make any independent or explicit allegation that he himself was without fault. So in an action by a servant to recover, of his master, damages for injuries occasioned by defects in the appliances furnished him, he need not allege that he was ignorant of the defects: *Mages v. North P. O. R. R. Co.*, 78 Cal. 430; 12 Am. St. Rep. 69.

GORDON v. HAZZARD.

[32 SOUTH CAROLINA, 351.]

MORTGAGES — PRIORITY AS BETWEEN ASSIGNEES OF BONDS SECURED BY ONE MORTGAGE. — As between the assignees of two bonds maturing at different times, and secured by one mortgage, there are no priorities, in the absence of express stipulation on the subject, and each is entitled to share *pro rata* in the proceeds of the sale of the mortgaged premises, if not sufficient to pay the mortgage debt in full.

Richard Dozier, for the appellant.

R. G. Rhett, and Inglesby and Miller, for the respondents.

MCGOWAN, J. The pleadings are not in the "case," but we suppose the facts from the report of the referee, T. M. Gilliland, Esq., may be stated with sufficient fullness to make the points intelligible. On June 1, 1879, William M. Hazzard, administrator of the estate of A. G. Trenholm, executed to G. A. Trenholm and Son (William L. and P. C. Trenholm) two separate bonds, dated June 1, 1879, and conditioned, one for the payment of nine thousand dollars on or before June 1, 1882, with the interest annually, and the other for a like sum, on or before June 1, 1883, with the interest annually; and to secure these bonds executed a mortgage of even date therewith, covering the premises described in the complaint (which we assume was regularly recorded). On April 4, 1881, G. A. Trenholm and Son made a promissory note to Mrs. May D. Gordon for \$4,803.45, payable one year after date, and assigned to her, as collateral security for its payment, the bond of Hazzard last maturing, viz., that due June 1, 1883. On April 12, 1881, Mrs. Fannie A. Trenholm loaned George A. Trenholm and Son seventeen hundred dollars, and it was then agreed that the bond of Hazzard payable in 1883 should stand as a security for the payment of that loan, after the payment of plaintiff's note.

On February 29, 1884, G. A. Trenholm and Son executed to Mrs. M. V. Macbeth their promissory note for \$1,514.43, pay-

able twelve months after date, with interest every six months; and on March 26, 1884, they executed to Mrs. A. H. Trenholm their promissory note for \$1,950, payable twelve months after date, with interest every six months. This note is now held by D. H. McCollough, guardian. As collateral security for the payment of these two notes, G. A. Trenholm and Son assigned the bond of Hazzard, administrator, first maturing, to wit, the bond payable in 1882, upon which bond all payments made by Hazzard had been credited. The note to Mrs. Macbeth recites the note to Mrs. Trenholm, and *vice versa*; and each of these notes declares the assignment of the bond payable in 1882 as collateral security for the payment of itself and the other.

On the bond payable in 1882, there was due on June 1, 1884, the sum of \$3,815.36, and there is now due on it \$3,815.36, with interest from June 1, 1884. On the bond payable in 1883, there was due on June 1, 1884, the sum of \$9,000, and the referee finds that this sum is now due, with interest; but it is alleged that Hazzard, on December 23, 1887, paid to Paul C. Trenholm, as agent for the plaintiff, \$336.24, to be credited on the bond held by her, and it is claimed that said sum should be credited on the bond held by plaintiff.

Plaintiff now brings this suit to foreclose the mortgage, and contends that, by reason of its earlier assignment, the bond payable in 1883, and securing her note, is entitled to priority of payment out of the mortgaged property. The defendants, Mrs. M. V. Macbeth and D. H. McCollough, on the other hand, maintain that the bond payable in 1882, and securing their notes, is the first to mature, and is therefore to be first paid out of the mortgage fund. The referee did not agree either with the plaintiff or the defendants, but held, as between the assignees, there was no priority; that both bonds were parts of the debt secured by the mortgage, and the different assignees were entitled to probate the mortgage fund between them, according to their respective proportions. Both parties excepted, and after hearing argument upon the exceptions, Judge Wallace, by short order, confirmed the report, and ordered it to stand as the judgment of the court, giving leave to apply at the foot of the decree for such orders as may be necessary to carry it into effect. From this decree both parties again appeal.

PLAINTIFF'S EXCEPTIONS. — "1. The referee, upon the facts found by him, erred in holding, as matter of law, that the

bond assigned to the plaintiff should be paid *pro rata* with that assigned to Mrs. Macbeth and Mrs. A. H. Trenholm out of the proceeds of the mortgaged property; 2. Upon the facts found, the referee should have held, as matter of law applicable thereto, that the bond assigned to the plaintiff, having been assigned to her more than three years before the assignment of the other bond to Mrs. Macbeth and Mrs. Trenholm, was entitled to priority of payment out of the proceeds of the mortgaged premises; 3. That where two bonds, secured by one mortgage, given by the same person at the same time, are transferred to different persons, for value, at different times, the first assignee is entitled to priority of payment out of the proceeds arising from the sale of the mortgaged property before the latter assignee; 4. That the subsequent assignee can only get what the assignor has to give at the time, and as between the first assignee of one of the bonds and the assignor retaining the other bond, the assignee, upon foreclosure, is entitled to be first paid out of the proceeds of sale before the assignor can come in, and the referee erred in not applying this principle of law to the facts as found by him in the case."

DEFENDANTS' EXCEPTIONS. — "1. That his honor Judge Wallace erred in not holding, as matter of law, that the bond securing the notes held by these defendants, being the first to mature, is therefore entitled to payment in full out of the proceeds of the mortgaged property, before any part thereof can be applied to the bond securing the plaintiff's note; 2. That his honor also erred in confirming the referee's finding that there is due on the bond securing plaintiff's note the sum of \$12,551.16, and thus failing to credit thereon the payment made by W. M. Hazzard, administrator, to P. C. Trenholm, on account of the interest on said bond," etc.

The question raised here is certainly a very interesting one, and from the fact that the parties interested take such entirely opposite views of their rights, we should infer that the precise question had never been clearly settled in this state. If we could take time from other engagements, it might be profitable to go fully into the subject, but, under the circumstances, that is impossible. In reference to the subject of the rights of assignees of parts of a debt secured by mortgage, Mr. Pomeroy says there are three distinct and different views: 1. One which gives priority to the assignment first in the order of time; 2. Another, which, disregarding entirely the date of the assignment, gives priority to that part of the

debt first falling due; 3. And still another, which gives none of the assignees any priority, but holds that all of them are entitled to a *pro rata* of the proceeds from the mortgaged property.

He remarks that the first—giving priority simply from the date of the assignment—is “a peculiar rule,” based upon the notion that, as between the mortgagee who assigns one note and retains the other, the assignee is entitled to the preference; and the first assignee having thus a priority as against the mortgagee, any subsequent assignee could only succeed to this position of the mortgagee, and so the assignees would all take in the order of their assignments, etc. He thinks the correct rule is that which gives priority to the note first falling due, upon the ground that the notes falling due at different times are like successive mortgages. But he proceeds as follows: “Another rule had been adopted by the courts of several states. Upon the same condition of facts, they hold there is no preference or priority whatever among the various assignees. The terms [times] of their respective assignments, or of the maturing of their notes, are alike immaterial. All the assignees are entitled, as among themselves, to share *pro rata* in the security of the mortgage and in the proceeds of the mortgaged premises, if there is not sufficient to pay all in full,” etc.: See 3 Pomeroy’s Eq. Jur., sec. 1201, and numerous authorities in the notes from Michigan, Pennsylvania, Tennessee, Mississippi, Texas, and other states.

This latter view, as it seems to us, is the most in accordance with equity. The mortgage debt, though in two bonds, was an entirety, and secured by one mortgage. If the debt, for the sake of convenience, was put in the shape of two bonds payable at different times, it was nevertheless the mortgage debt, as much as if instead of two bonds there had been but one, with two installments payable at different times. In the absence of any express stipulation on the part of the assignor, an assignee, in making an assignment of a particular installment, knows precisely what proportion of interest he is acquiring in the mortgage security. To the extent of that interest, the mortgage follows and secures him, and no further. If he gets what he bargained for, he has no right to complain. One of the cardinal maxims of the court is, that “equality is equity.” We think that, so far as the question has been touched in this state, the doctrine is indicated that, as between assignees of different parts of a mortgage security, there are no priorities:

See *Muller v. Wadlington*, 5 S. C. 342; *Adger v. Pringle*, 11 S. C. 530.

As to the alleged payment of \$336.24 to P. C. Trenholm as the agent of Mrs. Gordon, the circuit judge made no ruling, and that, of course, is not adjudged, but is left open for further inquiry.

The judgment of this court is, that the judgment of the circuit court, with the exceptions stated, be affirmed.

McIVER, J., dissented, and expressed it as his opinion that, as between the assignees of bonds maturing at different times, and secured by the same mortgage, priority should be given to the assignment first made in order of time. He stated that it is a well-settled rule that, as between the assignee and the mortgagee, the assignee is entitled to a preference, and argued that, this being so, he could not be deprived of his equity by any subsequent act of the mortgagee to which such assignee has not consented, could not prevent, and probably knew nothing of. "If the mortgagee, after having assigned one of the bonds secured by the mortgage, holds the same subject to the prior right of his assignee, it would seem to follow that as he could not transfer to another any higher or better right than he himself had, the second assignee must take subject to the rights of the first assignee. This would work no injustice to the assignee; for the terms of the mortgage, of which he is presumed to have notice, would inform him that it was given to secure the payment of two separate bonds. Ordinary prudence would therefore suggest to a purchaser the inquiry what had become of the other bond; and such inquiry would lead to the discovery of the fact that it had previously been assigned to a third person, who had thereby acquired a priority over the mortgagee; and if, in the face of this information, the purchaser saw fit to buy the other bond, which he knew was then subject to the bond previously assigned, he would have no just ground to complain, when such priority is subsequently asserted. In effect, the second assignee buys property which he knows is subject to the claim of a third person, superior to that of his vendor or assignor, and such superiority follows it into his hands. Practically, though not in form, he buys, or takes a lien upon, property which he knows, or ought to know, is subject to a prior lien in the hands of his vendor or lienor, and he therefore must take subject to such prior lien; for although it may not be correct to apply the term 'lien' in this way, yet the principle involved is the same, and I have ventured to use that term simply as illustrative of the principle. The view which I have adopted is in close analogy to the well-settled and undisputed doctrine that where a mortgagor sells to third persons, at different times, portions of the mortgaged premises, the first purchaser has an equity to require the mortgagee, when he comes to foreclose his mortgage, to sell the different portions in the inverse order of the sales by the mortgagor. This equity in the first purchaser exists, not only against the mortgagor, but also against the second and all subsequent purchasers. I do not see why, upon the same principles, the equity which the first assignee unquestionably has against the mortgagee should not also be recognized against the second assignee or purchaser. It is true that the mortgage was designed to secure the payment of both of the bonds; but when the mortgagee parts with one of them for a valuable consideration, equity will not allow him to enforce the security

for the payment of the bond which he has retained until his assignee, whose money he has received, has been paid; and a purchaser from him, the second assignee, has no higher rights than he has. As is said in *Clowes v. Dickerson*, 5 Johns. Ch. 241, 'he sits in the seat of his assignor.' So it is true, as in the case from which the above analogy is drawn, the mortgage covers the entire land, and if necessary, the whole of it may be sold; but by reason of the equity arising in favor of the first purchaser the moment he makes his purchase, he can require, not only that the portion of the mortgaged premises retained by the mortgagor shall be first sold, but also that sold to the second purchaser, before resort can be had to that bought by the first purchaser; for, as said by Chancellor Kent in the case cited, 'he sits in the seat of his grantor, and must take the land with all its equitable burdens.'"

MORTGAGE SECURING SEVERAL NOTES—PRIORITY.—Where a mortgage secures several notes, which mature at different times, and are assigned to different persons, and the proceeds of the mortgaged property are not sufficient to pay all the notes, such proceeds must be distributed among the different holders *pro rata*, irrespective of the dates of the assignments, or of the maturity of the different notes: *Pensei v. Brookmire*, 51 Ark. 105; 14 Am. St. Rep. 22, and note; see note to *Parker v. Mercer*, 38 Am. Dec. 440, 441.

EX PARTE LORENZ.

[32 SOUTH CAROLINA, 365.]

EXECUTIONS—CHATELLE MORTGAGED, WHEN NOT SUBJECT TO.—Chattels in the possession of a mortgagor after condition broken are not subject to judgment levy and sale by his creditors; and where, after levy in such case, the property is subsequently seized by the sheriff, acting as the agent of the mortgagee, and sold for more than enough to satisfy the mortgage, the judgment creditor is not entitled to the surplus arising from the sale. The title to the proceeds of the sale is in the mortgagee, subject to an accounting with the mortgagor.

Moss and Dantzler, and T. M. Raysor, for the appellant.

M. I. Browning, and Izlar and Glaze, for the respondent.

SIMPSON, C. J. The appellant, a merchant of Orangeburg, on the twenty-second day of May, 1889, executed a mortgage to one J. H. Beckman, covering his stock of goods, to secure \$877 of indebtedness, which mortgage was duly recorded. The debt intended to be secured was evidenced by bond dated the 22d of May, 1889, and due one day after date, etc. After the execution of the mortgage, certain parties obtained judgments against Lorenz, the appellant, in June thereafter, among them, F. W. Wagener & Co. and J. W. Brigham & Co., the cause of action in the Wagener & Co. judgment being an account for groceries furnished. Executions were issued upon both of these judgments, and a levy made the same day upon the stock of goods of Lorenz.

Neither of said judgments had indorsement made that they were based upon the purchase-money of the stock of goods in question.

Immediately after the levy, Beckman, the mortgagee, appointed the sheriff, Salley, his agent to take possession of and sell said stock of goods, which was done, the sale being made on the first Monday in July, 1889, the sheriff having advertised that, by virtue of a certain mortgage and certain executions, he would on that day sell said stock of goods, etc., "levied on as the property of Lorenz, under Beckman's mortgage, and at suits of F. W. Wagener & Co., and others." The proceeds of the sale amounted to more than sufficient to pay the mortgage debt by \$534.10, which balance remained in the hands of the sheriff after paying off said mortgage, costs, and expenses, and the contest here is over this balance. Lorenz claims it from the sheriff as an exemption to him under the homestead law. The judgment creditors claim it as applicable to their judgments.

The matter was brought before the court below by rule on the sheriff. His honor Judge Hudson, who heard the rule and return thereto, adjudged that the judgment creditors were entitled to the money, and he dismissed the rule, ordering the sheriff to pay the amount in his hands to said creditors. This ruling was based,—1. Upon the two-fund doctrine; and 2. That the basis of the Wagener & Co. judgment was a debt contracted in the purchase of the stock of goods; and although there was no certificate to that effect indorsed thereon, this could make no difference in this case. Lorenz appealed.

No question was made at the hearing below as to the validity of the mortgage. It was not assailed in any way, nor was it denied that the condition thereof had been broken before the levy of the executions by the sheriff. The mortgage, then, being unimpeached, and the condition thereof broken, the title to the property had unquestionably passed to Beckman, the mortgagee, and therefore when it was levied upon it did not belong to Lorenz, the mortgagor. Hence the executions had no lien thereon, nor had the sheriff any right to levy, and in addition, the mortgagee had a perfect right to take possession, as he did. It is true, the mortgagor would have had the right to redeem before sale, and still has the right to an accounting from the mortgagee. Under this state of the law, which is undoubted, as will be seen from an examination

of the following cases from our own court: *Reese v. Lyon*, 20 S. C. 20; *McClendon v. Wells*, 20 S. C. 520; *Levi v. Legg*, 23 S. C. 284; *Williams v. Dobson*, 26 S. C. 112; *Ex parte Knobloch*, 26 S. C. 336,— we cannot see how the judgment creditors have any claim in this case to this money in the hands of the sheriff. The legal title thereto belongs to the mortgagee, as it is the product of the sale of the property of the mortgagee. True, as is said above, the mortgagee is subject to an accounting with the mortgagor; but until such accounting, the proceeds of the sale of the mortgage property is, in contemplation of law, in the hands of the mortgagee.

We do not see, then, how the question of the two-fund doctrine could arise. That doctrine is applicable where the debtor has property over which one creditor may have a lien as a whole, and another creditor only on a part; and the question arises, whether or not the first creditor should not be required to exhaust so much of the property as is not covered by the lien of the second creditor, before going on the latter. These are not the facts here. The debtor here, instead of having two funds as a matter of contest between his creditors, is without even one fund. The property in dispute does not belong to him; it belongs to a third party, the mortgagee, Beckman. Nor do we see any application of the act requiring a certificate to be indorsed on a judgment and *feri facias* that the debt was contracted for the purchase-money of the property claimed as a homestead, so as to shut off such a claim. We may say, however, that we have recently held that such a certificate is necessary as to real estate: *Burnside v. Watkins*, 30 S. C. 459. How far this may apply to exemption of personal property, it is not now necessary to decide.

We think his honor's rulings were error, having no application here, for the reasons given; the property in question—we mean the money in the hands of the sheriff—not belonging to the debtor, but to a third party, who is not before the court. The questions raised and decided have no application to the case. We adjudge nothing now as to the right of the debtor, Lorenz, in this money, under the homestead law, should it ever reach him upon an accounting with the mortgagee. We only adjudge now that the judgment creditors have no claim on it in its present shape, for the reason that in law it belongs to the mortgagee, and not to their debtor.

It is the judgment of this court that the judgment of the circuit court be reversed.

EXECUTIONS — CHATTEL MORTGAGES — MORTGAGOR'S INTEREST. — Whether a mortgagor of a chattel has such an estate therein as is subject to levy and execution sale is not settled in South Carolina: *McKnight v. Gordon*, 13 Rich. Eq. 222; 94 Am. Dec. 164. Compare *Tannahill v. Tuttle*, 3 Mich. 104; 61 Am. Dec. 480, and note. In *Fox v. Crenan*, 47 N. J. L. 493, 54 Am. Rep. 190, it was decided that while the mortgagor's interest in mortgaged chattels might be levied upon even in the hands of the mortgagee, they could not be taken from the mortgagee without an offer to pay the mortgage debt. But in *Metzler v. James*, 12 Col. 322, it was decided that after condition broken, the interest of the mortgagor in mortgaged chattels was not subject to execution in favor of a creditor of the mortgagor, the mortgagee having taken possession of the property.

EX PARTE KARISH.

[82 SOUTH CAROLINA, 487.]

HOMESTEADS — EXEMPTION OUT OF PARTNERSHIP ASSETS. — Partners are not entitled to a homestead exemption out of partnership assets until the partnership debts are paid. If after this either partner has an individual interest remaining, he is entitled to a homestead exemption therein as against his individual creditors.

COSTS. — **AN UNSUCCESSFUL INTERPOSITION OF A PETITION FOR HOMESTEAD EXEMPTION** in an ordinary action does not prevent the plaintiff from recovering his costs.

W. J. De Treville, for the appellants.

Izlar and Glaze, for the respondent.

McIVER, J. It appears that appellants were copartners in trade, each interested to the extent of one half, and becoming embarrassed, executed an assignment of what purported to be the whole of their property, for the benefit of all of their creditors who should accept the provisions thereof, in full satisfaction of their demands. The action above stated was instituted for the purpose, amongst other things, of setting aside said assignment as fraudulent and void, and for the appointment of a receiver. That action resulted in a judgment setting aside the assignment, not only for the provision contained therein, in violation of the assignment act, but also for actual fraud, and a receiver was appointed to take charge of the assets and administer the same under the direction of the court. The receiver sold all the property of which he could obtain possession, and holds the proceeds of the sales.

At this stage of the proceedings, these petitions were filed, claiming that each of the petitioners, being the head of a family, was entitled to a homestead exemption in the partner-

ship property, and asking for an order that the receiver do pay to each of them, out of the proceeds of the sales in his hands, the sum of five hundred dollars as such exemption. These claims being resisted by the creditors, the case came before his honor Judge Hudson, who rendered judgment, dismissing the petitions, with costs, upon three grounds: 1. Because the petitioners are not entitled to the exemption out of undivided partnership property; 2. Because the exemption cannot be allowed out of funds arising from the sale of property, where the purchase-money of the said property has not been paid, against claims for such purchase-money; 3. Because the petitioners are barred of the exemption claimed by their fraud in the concealment and disposition of their property. From this judgment petitioners appeal, alleging error in each of the grounds upon which their petitions were dismissed, and also in awarding costs against them.

If the first ground can be regarded as asserting the general proposition that the homestead exemption cannot be allowed out of partnership property, it could not be sustained, as we have decided otherwise in the recent case of *Moyer v. Drummond*, 32 S. C. 165; *ante*, p. 850. But it should not be so regarded; for this court does not sit for the purpose of determining abstract questions of law, but the inquiry always should be, What is the law applicable to the facts of a given case? As it seems to us, there was no error in refusing to allow the exemption under the facts of this case, which were very different from those found in *Moyer v. Drummond*, 32 S. C. 165; *ante*, p. 850. There can be no doubt that until the partnership creditors are provided for the individual partners have no interest,—that is, can claim no individual right in the partnership assets, they being entitled to their shares in whatever may remain after the partnership creditors have been provided for. As is said by Simpson, C. J., in *Hutzler v. Phillips*, 26 S. C. 150, “the property of the firm is not liable for the separate debt of a member; only the interest of the member is liable, which is nothing until the firm debts are paid.” Now, as it appeared in this case that the partnership assets were insufficient for the payment of the partnership debts, which not only had not been, but would not be, paid by such assets, it is quite clear that neither of the petitioners had any right to any portion of such assets, and the exemption was refused, properly, for the reason that neither of them had any right to the property out of

which the exemption was refused, and not because it was partnership property. The case is somewhat analogous to that of tenants in common claiming a homestead out of lands descending to them as heirs of their ancestor, whose debts have not been paid. Until such debts are provided for, the heirs can claim no homestead as against their own debts, not because the lands are undivided, and are held by them in common, but because their right to the same is dependent upon the payment of the debts of the ancestor. They cannot, except in the case of a widow and children, specially provided for by statute, even make such claim against the debts of the ancestor.

In the case of *Moyer v. Drummond*, 32 S. C. 165, *ante*, p. 850, the facts were different. In that case the effort was to subject the individual interest of the judgment debtor in a partnership to the payment of the judgment by proceedings supplementary to an execution; and with a view to ascertain the individual interest of the judgment debtor in the partnership assets, testimony was offered, and the referee found, as matter of fact, that such interest, after providing for the payment of the partnership debt, amounted to a sum less than five hundred dollars, which finding of fact was affirmed by the circuit judge, and no exception was taken thereto. This court therefore considered the case as presented, and finding that the individual interest of the judgment debtor in the partnership assets had been ascertained to be less than the amount of the exemption provided for by the homestead law, allowed the exemption. Here, however, no such facts are presented, and, on the contrary, the testimony shows that neither of these petitioners can have any individual interest in the partnership assets after the partnership debts are paid, and hence there is nothing out of which the exemption can be claimed.

As this view is conclusive of the case, it is unnecessary to consider the other grounds upon which the circuit judge rested his conclusion; for until the right of exemption has been established, the question whether such right has been defeated cannot properly arise.

It only remains to consider whether there was any error in awarding costs against the petitioners. The cases relied on by appellants of *Columbia Water Power Co. v. Columbia*, 4 S. C. 388, and *Carolina Nat. Bank v. Senn*, 25 S. C. 572, we do not think are in point. In the former case, it was held that the code makes no provision for costs in special proceedings, but

only in actions. This case not being a special proceeding, but an ordinary civil action, in which the appellants have intervened by petition, does not fall within the scope of that decision. In the other case, the application was made for homestead in the mode prescribed by statute, where the sheriff was proceeding to levy upon the property of the judgment debtor, and the court, without determining whether that was a special proceeding, simply held that as the homestead law made a special provision for costs in such cases, which provision did not cover that case, costs could not be awarded. Here, however, as we have said, this was not a special proceeding, but simply a step taken in an ordinary action; and hence the case falls under the general law regulating the allowance of costs in such actions.

The judgment of this court is, that the judgment of the circuit court be affirmed.

HOMESTEAD — PARTNERSHIP PROPERTY. — The prevailing doctrine is, that a homestead cannot be set apart out of partnership realty, as long as creditors have unsatisfied claims against the partnership. Note to *Pryor v. Stone*, 70 Am. Dec. 346; note to *McCoy v. Brennan*, 1 Am. St. Rep. 594, 595.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE

WELCKER v. STAPLES.

[38 TENNESSEE, 49.]

SEVEN YEARS' ADVERSE POSSESSION GIVES TITLE TO LAND.—Where a debtor conveys land to his wife and children, who remain in the actual possession thereof, claiming it as theirs, for more than seven years, a suit by his creditors, attacking the conveyance, as made in fraud of their rights, will be barred. And the fact that he lived with them during the time makes no difference, since the possession is presumed to be with the legal title.

REVERSAL OF JUDGMENT, EFFECT OF, ON RIGHTS OF PURCHASER AT SALE.—Where the purchaser at a judicial sale is either a party or a privy to the suit in which the sale is ordered, his title will be defeated by a reversal of the judgment or decree, upon writ of error sued out after the making of the sale. And a maker of a general assignment for the benefit of creditors is a privy to a suit brought by his assignee to recover assets.

BILL to set aside conveyance of land alleged to have been fraudulent. The opinion states the facts.

Welcker and McNutt, for Welcker.

G. W. Henderson, for Staples.

TURNER, C. J. Joseph Mueke and Son, being indebted, for the benefit of creditors, made a general assignment to complainant, Welcker, in trust.

Thomas Staples, who was indebted to Mueke and Son by judgment in the sum of about \$104, conveyed his land to his wife and children for a recited consideration, part of which was paid.

The assignee filed this bill, attacking said conveyance for fraud. The chancellor decreed for complainant, the land was

sold, and purchased by Mueke, the senior member of the firm. The case is before us on writ of error.

It clearly appears that for more than seven years prior to the filing of the bill, the vendees were in the actual possession of the land, claiming it as theirs. The fact that the husband and father lived with them makes no difference, as the possession is presumed to be with the legal title.

Mueke, the purchaser, while not a party by name, is a privy to this suit. If complainant, his assignee, succeeds, a debt is paid to him which is to be applied to the claims of his creditors, and for his benefit. He will have an interest in any surplus remaining of his assigned estate after the payment of his debts; therefore his title will fail on reversal upon a writ of error.

Decree reversed, and bill dismissed, with costs.

ADVERSE POSSESSION.—In the case of *Wyatt v. Ham*, 23 Ga. 201, 68 Am. Dec. 518, land was sold under an execution as the father's, to whose minor sons the purchaser conveyed it. The father and the sons took and held joint possession under this conveyance, and, subsequently, the land was again sold under execution as the father's. The second purchaser, after more than seven years from the commencement of such joint possession, sued the father and the two sons for the land. Under these circumstances, the possession of the sons was held to be adverse to the purchaser.

ADVERSE POSSESSION.—A husband holding land adversely may convey to his wife, who may continue to hold adversely until action to recover the land is barred by the statute of limitations: *Curboy v. Bellemer*, 70 Mich. 106.

JUDGMENTS—REVERSAL OF—EFFECT UPON PURCHASERS AT JUDICIAL SALE.—Reversal of a judgment in the appellate court restores the parties to their original rights, so far as this can be done without prejudice to third persons: *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 138, and particularly note 144; *Adams v. Odom*, 74 Tex. 206; 15 Am. St. Rep. 827, and note.

LAWRENCE v. INGERSOLL.

[38 TENNESSEE, 52.]

INJUNCTION NOT MANDATORY WHEN.—An injunction which prohibits the parties enjoined from meeting and acting as a board of education, without giving the complainant notice, and permitting him to act with them, is not mandatory.

LEGALITY AND VALIDITY OF ELECTION OF OFFICER MAY BE INQUIRED INTO BY MANDAMUS WHEN.—When a city charter provides that an election shall be made by the mayor and aldermen by ballot, no other official being directed to declare or certify it, and no provision is made for a contest, the legality and validity of such election may be inquired into in any proceeding by *mandamus* to compel others to recognize the claimant's title to the office, or when he seeks to enter into it, or otherwise assert his right to act as duly elected.

CERTIFICATE OF ELECTION MADE BY OFFICER WHO HAD NOTHING TO DO WITH ELECTION, or with the certifying of it, does not affect the question of the validity of the election of the person to whom such unauthorized certificate is given.

ELECTION BY DEFINITE BODY, MAJORITY OF QUORUM NECESSARY IS.—In an election by a definite body, as by a board of aldermen and mayor, in the absence of a statutory provision to the contrary, a majority of the body present and acting must vote for a candidate, in order to elect him; and it is not sufficient for him to receive a plurality of votes cast, or a majority, if blank ballots are excluded. Where, therefore, a board consisting of nine aldermen and a mayor, the latter having no vote except in case of a tie, undertake to elect an officer at a meeting at which there are eight aldermen and the mayor present, and four ballots are cast for one candidate, three for another, and one blank ballot, and the mayor declares the candidate who received the four ballots elected, whereupon a motion to reconsider is made, and four votes are cast for and four votes against the motion, and the mayor, without voting, declares the motion lost, there is no valid election.

BLANK VOTE IS NOT, TECHNICALLY, A BALLOT; but it is, nevertheless, an act of negation,—affirmative in showing that another voter acted, and negative in determining the majority.

ACTION OF MAYOR IN DECLARING ELECTION CARRIED IS INEFFECTUAL, in a board consisting of nine aldermen and the mayor, where, eight aldermen being present, four vote for one candidate, three for another, and one casts a blank ballot, because, there being no tie, the mayor had no right to vote.

ELECTION REQUIRED TO BE BY BALLOT CANNOT BE RATIFIED by a vote not taken by ballot, nor in any case without a majority vote to ratify it.

BILL for an injunction. The opinion states the case.

Taylor and Hood, and Wat. M. Cocke, for Lawrence.

J. W. Caldwell, and Ingersoll and Peyton, for Ingersoll.

SNODGRASS, J. The bill in this cause was filed by J. C. Lawrence, claiming to be a duly elected and qualified member of the board of education of the city of Knoxville, for an injunction against defendants,—the other four members of said board,—to prohibit the meeting and action of said board without him, and to compel defendants, by *mandamus*, to recognize him as a member of the board, and permit him to take part in its proceedings, upon allegation of refusal of defendants so to do.

The injunction issued, and, on final hearing, *mandamus* was awarded, as prayed for.

Respondents appealed, and assigned errors.

Two preliminary questions are made, which need to be briefly noticed before disposition of the real merits of the controversy. One of these is made by respondents, and is an

objection to the power of the court to issue a mandatory injunction, upon the assumption that the one issued in this case is such. The other question is made by complainant, and goes to the right of the court to inquire into the legality and validity of his election in this proceeding.

Respecting the first question, it is sufficient to say that the injunction is not mandatory. The injunction prohibited the meeting and acting of defendants without giving complainant notice, and permitting him to act with them. It did not command his admission, except the respondents proceeded to act. It prohibited their acting, but authorized them to avoid this prohibition on compliance with conditions which they could or could not accept, as they saw proper, and was clearly not mandatory. It therefore becomes irrelevant and unimportant to discuss the question of the right to issue mandatory injunctions, and the extent to which they may go.

As to the second question stated, it is equally clear that the chancellor had the right to determine the legality and validity of the election under which complainant claimed title to the office for the exercise of the powers of which he sought the aid of the court. His election depended alone upon the action of the board of mayor and aldermen, as embodied in the record made of it by them. The notification called a certificate, issued to him by the recorder, is of no force or validity, because not required by law. But if it were, it could only embody the result of the record of election, and could not add to its efficacy in the least, or change its effect.

All the provision made in the charter of Knoxville respecting this election pertinent to the point now being considered is, that it shall be made by the mayor and aldermen, by ballot. No other official is, in terms, directed to declare it or to certify it, nor is any provision made for a contest.

In such case, it is well settled that the legality and validity of such election may be inquired into in any proceeding by *mandamus* to compel other persons to recognize the claimant's title to the office, or when he seeks to enter into it, or otherwise assert his right to act as duly elected: 6 Am. & Eng. Ency. of Law, 384, 385, and cases cited; *Marshall v. Kerns*, 2 Swan, 67, 68; *Pucket v. Bean*, 11 Heisk. 600; *Lewis v. Watkins*, 3 Lea, 181, 182.

These questions out of the way, we come to the real question in the case: Was the complainant elected, and is

he therefore entitled to compel the defendants to admit and recognize him as a member of the board?

To determine this, it is necessary to examine his claim to election, and then ascertain if, under the law, it is well founded. To support the first, he shows the following record from the minutes of the proceedings of the board of mayor and aldermen, in addition to the notification or certificate of the recorder, before referred to, and indorsement thereon of the recorder, that complainant had taken the oath required by law.

"At a called meeting of the board of mayor and aldermen of the city of Knoxville held Friday, January 27, A. D. 1888, there were present, and answering roll-call, Aldermen Selby, Barry, Hockinjos, Jones, Albers, Horne, Perry, and McDaniel. Mayor Luttrell called Mayor-elect Condón and ex-Mayor Fulcher and Alderman S. B. Boyd to take seats on mayor's stand. The following proceedings were had, to wit:—

"The minutes of the meetings of this board of January 6th, January 25th, and January 26th were read and approved.

"On motion of Alderman Albers, the board took a recess of five minutes. Mayor Luttrell resumed the chair, and called the board to order. Alderman Perry moved to go into an election for a member of the city school board, to fill out the unexpired term of Hon. M. J. Condon, resigned. Motion carried.

"Mayor Luttrell appointed Aldermen McDaniel and Barry as tellers, and Alderman Perry to take up the vote.

"Alderman Perry nominated F. L. Fisher. Alderman Jones nominated Mr. J. C. Lawrence. The ballot was taken, and it was found that J. C. Lawrence had received four votes, and F. L. Fisher three votes; and a blank was also found, without any name, and thrown out.

"Mayor Luttrell declared J. C. Lawrence legally elected as a member of the city school board of education, to fill out the unexpired term of Hon. M. J. Condon, resigned. Some discussion was had, after which Alderman Perry moved to reconsider said vote and election. Seconded by Alderman Albers.

"The ayes and noes were taken on roll-call, Aldermen Selby, Hockinjos, Albers, and Perry voting aye, and Aldermen Barry, Jones, Horne, and McDaniel voting no.

"Major Luttrell decided the motion lost.

"On motion of Alderman Barry, the board adjourned till nine o'clock to-morrow morning.

"(Signed) Approved: JAS. C. LUTTRELL, Mayor."

"CITY OF KNOXVILLE, TENN., January 31, A. D. 1888.

"MR. J. C. LAWRENCE.

"At the regular meeting of the board of mayor and aldermen of the city of Knoxville, held January 27, A. D. 1888, you were chosen and elected as a member of board of education, to fill out the unexpired term of said office of Martin J. Condon, resigned.

"By order of the board. C. C. NELSON, Recorder."

"Enrolled 1, 12, '89. Bk. I., p. 45.

"J. C. Lawrence came before me and took oath of office, as required by new charter, January 31, 1888.

"C. C. NELSON, Recorder."

Upon this record, and these statements of the recorder, he bases his claim to the office, and right to a peremptory *writ*.

No question is made that the oath stated to have been taken is not shown to have been done by this indorsement, nor upon the notification or certificate, as such. The question is only made, as to the latter, that the recorder had nothing to do with the election, or certifying it, and that this certificate does not affect the question; and this is true.

This brings us to the second subdivision of the real question, — that is, to determine whether, under the law, he was in fact elected. The provisions of the charter in relation to the election are found in several sections of the act of June 10, 1885, entitled "An act to reduce the acts incorporating the city of Knoxville, and the various amendments thereto, to one act, and to amend the same."

Section 63 of this act provides that there shall be a board of education for the city, to consist of five members, citizens of the town, and not members of the board of mayor and aldermen.

"Section 64. The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town, by ballot, and the term of office of each member shall be five years.

"Section 3. . . . The board of mayor and aldermen shall be composed of nine aldermen.

"Section 4. . . . The mayor shall not vote, except in case there shall be a tie vote, on any question, and then he shall, by his vote, decide the question. . . .

"Section 5. It shall require a majority of the members of the board to form a quorum for the transaction of business."

No provision being made for the filling of vacancies in the board of education, this defect was remedied by an ordinance, as follows:—

“In case any vacancy shall occur in the board of education, the unexpired term of such member vacating shall be filled by an election by the board of mayor and aldermen as soon as practicable after such vacancy occurs.”

These are all the provisions of the charter or ordinances of the city necessary to be noticed. They are those under which the election was held, and the provisions of which must determine its validity or invalidity, no other law existing in our statutes which affects the question.

It is observed that there are nine aldermen who, with the mayor, are to make the election, if all are present, the mayor having no vote, as no tie could result; that if less than nine are present, but a majority of that number, then those present may elect; but if equally divided in an election, the mayor may cast the deciding vote,—the only contingency in which his act can affect the question.

In the election now being considered, a majority (eight) were present, and participating in the election. This appears both in the recitals of the record hereinbefore shown and in the fact that seven ballots were cast for the candidates, and one blank ballot.

It remains now to inquire, What is the effect of this action on the part of this board, acting through its eight members, an authorized quorum?

In determining this question, it must be borne in mind that we are not examining the effect of an election by an indefinite number of electors, as the vote of the body of the people of the city, or the vote of any indefinite number of people, in a popular election; for the rule governing the one is entirely different from that governing the other.

In the case of a general or special election by the vote of the people, by the vote of an indefinite number, the common-law rule is, that a plurality of votes elects,—that is, the candidate getting more votes than any other is elected, although he does not get a majority of the votes cast, and hence it makes no difference that there are absent voters, or blank votes cast. They do not change the fact that one candidate receives a plurality, and cannot do so, in the very nature of things: Cooley on Constitutional Limitations, 5th ed., sec. 779; see also secs. 770, 771.

Mr. Cooley treats alone the subject of popular elections, the scope of his work not including elections by governing bodies of corporations.

This is not only the rule at common law, but it is so by statute in this state; and hence, in our elections by the people, the candidate who gets the highest number of votes is elected.

And this rule is applied to corporate action, where the corporate power resides in the inhabitants or citizens at large, and where they meet and act in their primary capacity, and hence in indefinite numbers: Dillon on Municipal Corporations, secs. 208-215.

But the rule is equally well settled, and indeed is not open to controversy, that where an election is to be made by a definite body of electors, as a number of aldermen, that, "in the absence of special provision, the major part of those present at a meeting of this select body must concur, in order to do any valid act": Dillon on Municipal Corporations, secs. 216, 220.

"Where, therefore," adds the author, "it appeared that thirteen ballots were cast when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election, and the council, though it has declared that the person receiving seven votes was duly elected, may rescind its action, and proceed to a new election": Dillon on Municipal Corporations, secs. 216, 220.

And this common-law rule as to majorities he declares is applied to governing bodies of municipal corporations, where not specially regulated by charter or statutes: Dillon on Municipal Corporations, secs. 216, 217.

We have seen that it is not only differently regulated by the charter of Knoxville, or other statute of Tennessee, but that the charter provides for the transaction of business only by a majority of a quorum, and gives the mayor a right to vote when the majority thereof cannot decide, thereby conclusively showing that a majority must concur, or there is no result. A different rule, as we have seen, and we repeat, prevails at common law, where the election is by an indefinite number of electors, in which a plurality of votes is sufficient for an election.

These rules and their distinctions are very forcibly and clearly stated in the able treatise on elections in the sixth volume of American and English Encyclopædia of Law, as follows: "The only way to defeat the election of a candidate at an election where the number of the electors is indefinite, or where the law does not require a majority of all the members

of a body having a definite number (as opposed to a majority of those voting), is by voting for another candidate; and the fact that a majority enters a protest against the minority candidate voted for at a regularly called election will not defeat the election, if no other candidate is voted for. This rule does not apply to cases where the elective body consists of a definite number, and a majority of the members is required for an election. In such case, a refusal to vote, or a blank vote by a majority, will defeat an election": Pages 322, 331.

We have heretofore seen that under this charter a majority of the quorum is required. This author shows further that the rule respecting the election by a definite number in a municipal body extends also to other bodies of definite numbers, as legislatures, etc., and shows that in such case a majority must concur, and vote for the candidate, in order to elect him; quoting several cases and instances of high authority. He says, illustrating: "By section 15 of the Revised Statutes of the United States, it is provided that all votes for senators shall be by *viva voce* vote of members of the legislature, and by section 37, that all votes for representatives in Congress must be written or printed ballots, and that all votes received or recorded contrary to such action shall be of no effect. It has been held that where there is no provision of law making a plurality sufficient for an election, that a majority of the votes cast must be for a candidate, in order to elect him": 6 Am. & Eng. Ency. of Law, 332, citing *State v. Fagan*, 32 Cong. El. Cas. 45.

He cites several cases sustaining the text, the notes being as follows: "In the absence of any act of Congress on the subject, a state may pass a law, or a joint or concurrent resolution of the legislature requiring a majority of all the members elected to both branches of the legislature to elect a senator of the United States; and in such a case, where twenty-nine votes were given for one candidate, and twenty-nine blank votes were given, it was held that this did not constitute an election: 2 Cong. El. Cas. 608; *Yule v. Mallory*, Sen. El. Cas. 146." And again: "In 1866, in the Stockton case, in New Jersey (Senate Election Cases, 264), it appeared that there was no law in the state regulating the election of senators; and there had been a practice of regulating the election of all officers by resolution of the convention, and at the convention for the election of senators, in 1865, a resolution was adopted that a plurality of the members present might elect.

The judiciary committee, reporting through Senator Trumbull, decided in favor of the validity of the election, but the resolution was amended by the close vote of twenty-two to twenty-one, and the candidate was declared not elected. It was claimed by some of the senators that the parliamentary law required a majority to elect, and this could only be changed by a law or a resolution of the house: acting in their legislative capacity": 6 Am. & Eng. Ency. of Law, 332.

Thus it appears, by concurrence of text-book, judicial, senatorial, congressional, and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate, in order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority, if blank ballots are excluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote. It is not sufficient that a majority were not cast against him; to be elected, the majority must be cast for him.

"So if a board of village trustees consists of five members, and all, or four, are present, two can do no valid act, even though the others are disqualified, by interest, from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum. Then the votes of two, being a majority of the quorum, would be valid; certainly so, where the three are all competent to act": Dillon on Municipal Corporations, sec. 217.

These authorities answer the proposition urged by complainant, that the blank vote must not be considered, and it must be treated as though only seven votes were cast, and he got four. It is true that the blank vote cannot be, in the technical sense, a ballot; but it is nevertheless an act of negation, — affirmative in showing that another voter acted, and negative in determining the majority. It was one of eight attempted to be cast with a purpose of not supporting complainant, and is only to be counted as showing that he did not get a majority; just as would have resulted had it been an illegal vote, as being for two candidates, or otherwise.

But complainant's case would be no better if that vote was entirely disregarded, because the record otherwise shows that eight aldermen were present, and without reference to their vote, he must have received five votes, in order to be elected.

The roll-call shows eight present. On the vote to reconsider, eight voted. Indeed, it is not anywhere contended by complainant that they were not all present and participating, and, as shown, the contrary affirmatively appears.

But it is said that the mayor declared the election carried, and that this is equivalent to a vote for him, and with four votes for him and four not for him, the mayor's vote or action makes the election.

There are several answers to this, all conclusive: 1. The mayor had no right to vote, as there was no tie; and 2. He did not vote; 3. His action declaring the result, without voting, could not make an election, because the law does not allow him to declare a candidate elected, even on a tie, without voting, or at all.

He can only, in such case, vote and make an election; and when he does this, it makes it, even though he should then declare the candidate not elected.

A still further argument is made, however, that the board appears to have ratified it, and this should be treated as giving it validity.

The answers to this are, if possible, even more conclusive. They are: 1. That the board has no power to elect except by ballot. There was never but one ballot cast, and if that did not make it, no election could otherwise be made. 2. The board did not ratify it. On the contrary, four members voted to reconsider, and therefore against ratification, and four for it. This, at best, while unimportant, was not an affirmative; it was, at most, but a tie, which the mayor might, by his vote, have decided. He did not choose to vote, but, instead, declared the matter lost. In both instances, the mayor refused or failed to vote, and contented himself with declaring that the results stood accomplished without his vote. We are not presenting the parliamentary question, or attempting to show that four against four would rescind any legal action. We are only showing that no majority ever, in any way, voted to ratify the election. The argument need not be repeated here, that this meant nothing and accomplished nothing. The law is, that they could not make an election by ratification, and the fact is, they did not.

In addition to the effort to reconsider, it is said, as evidence of ratification, that on the notification, called "certificate," of the recorder, in which he advises complainant of his election, he appends to that statement the words "by order of the

board," and that this is evidence of ratification. Having shown that ratification could not make, or make valid, an election, it is, perhaps, superfluous to deal with the evidences of it; but having denied the fact, it is proper not to overlook this point as bearing on the question of fact as to whether or not any act of the board was an attempted ratification.

We have seen that the recorder has nothing to do with the election, either to make or declare or certify it, under the charter. This whole paper, including indorsement, therefore goes for nothing. His statement, in a paper, that he was not required to make, that it was done by order of the board, would not prove that fact, of course, and no other evidence of it is offered. He may, and doubtless did, think himself authorized to make it, and may have been ordered to do so; but no such order is produced, and nothing else proves it.

The construction herein given to the charter regulating municipal elections and the action of municipal boards is not only sound in law, but in policy. It would be of the most injurious consequence to hold that municipal bodies could make elections, or appropriate money, legislate rights away, or pass measures affecting vast property interests, by less than an affirmative vote of an acting majority. It is going sufficiently far to allow them to act by majority of a quorum present; but if, by legislative act or judicial construction, they should be authorized to act by a minority of a quorum, there would be no safeguards effectual to protect the public within the scope of their authority. It is equally salutary to provide, by following well-founded principles and precedents, that what they will not, or do not in fact, do by vote they shall not have power to accomplish by declaring it done without vote.

Reverse the decree, and dismiss the bill, with costs.

TURNER, C. J., while agreeing with the other members of the court that if the complainant was a duly elected member of the board of education, he was entitled to his voice therein, and the chancery court had the jurisdiction to enforce his claim, did not assent to their conclusion that there was no such election by the mayor and board of aldermen as the charter contemplated. The following is a synopsis of his dissenting opinion on this point: Even under the rule laid down by Mr. Dillon, there was an election. As there was no dissent to the motion for an election, to hold it, as was done, was a valid act, in which all present concurred. If it was necessary for all the aldermen present to vote, this necessity was conformed to; for eight votes were cast, although one of the ballots was a blank. The blank, if regarded at all, was an expression of indifference by the alderman who cast it, as between

the candidates nominated, and therefore of consent that he who should receive a majority of those actually voting should be the elected member of the board of education. The mayor so interpreted it when he declared Lawrence elected, and the board so interpreted it when they refused to reconsider. And the same interpretation appeared in the unchallenged certificate of election, furnished by the recorder, "by order of the board," with objection from no one.

No account should be taken either of the blank ballot or of the nominal presence of the alderman who cast it. If he had retired from the room, a majority of the seven voting would have made an election. When, after voting to hold an election, he determined to take no part in the election, he, in legal contemplation, absented himself from the board, and did not change that contemplation by dropping a blank ballot in the box. The fact that he voted for an election at that meeting would not make him present for the election. Nothing can constitute a presence but participation. If there was participation, it was by acts signifying a full acquiescence in the action of the majority voting.

Under the rule laid down in Cooley on Constitutional Limitations, 3d ed., sec. 14, the blank is not to be counted. The presence of him who cast it was not necessary to a quorum to make an election. It is admitted that if he had been in fact absent, the election would have been lawful and free from objection. Even though casting a blank ballot be held to be a participation in the election, still complainant, having a majority of such number as was authorized to elect, was elected, notwithstanding the presence and participation of him who cast the blank, which is not to be counted.

If five had been present at the election, with three voting for one man, and two for another, or two voting blanks, or not voting at all, the election would have been complete. Here seven did actually vote, and one did not. Why should the blank be counted against the complainant? We might as well count it for him. The juster rule is, not to count it at all. The rule cited from Judge Cooley should be adopted in the first case of the kind arising in this state. The blank was nothing, and should be counted for nothing; without it, or its author, there was a complete quorum, and their action should be affirmed. If a quorum may hold an election, a majority of that quorum may make an election. Under the rule laid down by the majority of the court, one man will have power, by voting a blank ballot, to defeat an election.

MUNICIPAL CORPORATIONS — PROCEEDINGS OF TOWN COUNCIL. — In *Attorney-General v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576, it is said that "in the absence of express regulation, a proposition is carried in a town meeting, or other legislative assembly, by a majority of the votes cast"; citing Dillon on Municipal Corporations, sec. 44, p. 63, note 2. And the acts of the majority present at a town meeting bind not only the minority present, but all councilmen who are absent: *Chamberlain v. Dover*, 13 Me. 466; 29 Am. Dec. 517. Compare *Heiskell v. Mayor*, 65 Md. 125; 57 Am. Rep. 308. If a quorum of a municipal council is present, and a majority of such quorum vote in favor of a measure it will prevail, although an equal number refrain from voting: *Rushville G. Co. v. Rushville*, 121 Ind. 206; 16 Am. St. Rep. 388.

MANDAMUS. — As to when and for what purposes a writ of *mandamus* will lie, see extended note to *Dane v. Derby*, 89 Am. Dec. 728-742. *Mandamus* should not be denied where there is a right, and the law has established no

specific remedy; it should issue to prevent a failure of justice: *State v. Kirk*, 12 Fla. 278; 95 Am. Dec. 314. And while *mandamus* may be the remedy to restore an officer unlawfully removed from office, yet, ordinarily, *mandamus* will not lie to try title to an office, nor to compel a person holding an office to admit another thereto: Note to *Metsker v. Neally*, 13 Am. St. Rep. 273.

DYE v. COOKE & Co.

[88 TENNESSEE, 275.]

HOMESTEAD RIGHT, DEBTOR MAY ACQUIRE, BY MARRYING, WHEN. — A debtor who owned lands at the time when he contracted the debt may subsequently acquire a homestead right therein, by reason of his marriage, if his creditor had no fixed lien thereon at the date of the marriage. The law which allows the debtor to acquire a homestead right in such case impairs no legal right of his creditor.

S. F. Wilson and W. C. Dismukes, for Dye.

J. J. Turner, for Cooke & Co.

LURTON, J. This case involves the right of a debtor to a homestead exemption. At the time he entered into the contract upon which judgment was finally procured against him, he was the owner of the land in which he now claims a homestead exemption. He was then an unmarried man, and not the head of a family, and not therefore entitled to any exemption.

Subsequently, but before any lien had been fixed upon this land by either judgment or levy, he became a married man, and the head of a family. He now claims that, as the head of a family, he is entitled to a homestead exemption in this land, it being worth less than one thousand dollars.

By the state constitution and legislative enactment, every head of a family is entitled to a homestead, to the value of one thousand dollars, which is declared to be exempt from sale under legal process. The debtor, in this case, as the head of a family at the time it was sought by legal process to sell this land, was clearly entitled to the benefit of this provision of the law, unless the law be obnoxious to that provision of the constitution of the United States which prohibits any state from passing any law which impairs the obligation of a contract. The contention of the creditor is, that as to debts created before he became the head of a family, the law does impair the obligation of the contract, if it be held applicable to

property owned by the debtor before he became the head of a family, and at the time he entered into the obligation, such property being then subject to forced sale.

This court held, in September, 1872, and in advance of the supreme court of the United States, and contrary to the decisions of the courts of a number of other states, Justice Freeman delivering the opinion of the court, that as to debts and contracts existing at the time of the enactment of our homestead law, the law was unconstitutional, in that the remedy of the creditor against his debtor was destroyed by the exemption of his property from liability: *Kennedy v. Stacey*, 1 Baxt. 220; *Hannum v. McInturf*, 6 Baxt. 225.

The supreme court of the United States subsequently announced the same conclusion: *Gunn v. Barry*, 15 Wall. 610.

The validity, however, of such exemptions, as to debts created after the law, was never seriously challenged. The law which gives the creditor his remedy, and the law which gives the debtor his exemption, are as much parts of the contract as if they had been set forth in the stipulations of the agreement by which the debt was originated. The homestead law was in force at the time this contract was entered into between Dye and Cooke & Co. The law has not since been changed. The attitude of their debtor toward the law has changed by his subsequent marriage. The creditor knew that if before they had fixed a lien upon this land their debtor should become the head of a family, that he would be entitled to a homestead exemption. The *status* of their debtor at the time they should attempt to subject his land to forced sale would determine their right and his exemption. His *status* at the time the debt was created neither fixed his right or their remedy. They also knew that if he should encumber it or sell it before they had acquired a lien, they could not subject it to their debt. The law no more prohibited his doing the one than the other. He had the legal right to marry, and thus become the head of a family, and thereby entitled to a homestead. So he had the right to sell it, or to secure another creditor by an encumbrance. The creditors had no more right to demand that he should hold the property subject to their claim than they had to demand that he should remain single. No legal right of the creditors has been impaired, and no fraud has been practiced upon them. A different question would arise if they had acquired a lien by levy or judgment before his marriage, upon which it is unnecessary to intimate

an opinion: *Pender v. Lancaster*, 14 S. C. 25; 37 Am. Rep. 720.

The view we have reached is in accord with the cases of *North v. Shearn*, 15 Tex. 174; *Trotter v. Dobbs*, 38 Miss. 198. We have been unable to find any holding to the contrary, and the learned counsel for appellants have cited us to none.

The decree must be affirmed.

HOMESTEAD — MARRIAGE. — The marriage of an execution debtor after levy upon personal property, but before sale, does not entitle him to a homestead exemption: *Pender v. Lancaster*, 14 S. C. 25; 37 Am. Rep. 720.

PEOPLE'S BANK v. FRANKLIN BANK.

[38 TENNESSEE, 293.]

FORGED CHECK, LIABILITY OF BANK FOR NEGLIGENTLY CASHING. — A bank which negligently cashes a forged check purporting to be drawn upon another bank, and upon its indorsement of the check receives payment from the drawee bank, is liable to the latter bank for the amount received, upon subsequent discovery that the check was forged.

NEGLIGENCE IN BANK CASHING FORGED CHECK, WHAT IS EVIDENCE OF. —

Where a bank that cashes a forged check is unable to give the name of the person who presented such check, or of the person to whom it was paid, or to state positively that it required identification of such party, this is sufficient evidence of its negligence to render it liable to the drawee bank to which it indorsed it. And the drawee bank will not be precluded from recovery because, relying upon the indorsement of the other bank, it paid the check without investigation as to its genuineness.

BILL to recover amount paid by mistake on a forged check. The opinion states the case.

Stark and Stark, for the complainant.

Leech and Savage, for the respondent.

FOLKES, J. Young was a depositor of the complainant bank. His name was forged to a check drawn on the complainant, payable to the order of one Morgan. Morgan's name was also forged as an indorser on the check. This check, with the forged name of Young, the maker, and of Morgan, the indorser, was presented to the defendant, the Franklin Bank, and was cashed or purchased by the defendant, and transmitted, after indorsement by the defendant, to the complainant bank, by mail. The complainant bank had and kept an account with the defendant bank, and upon

the receipt of the check, passed the amount thereof to the credit of the defendant bank. The complainant bank was located and did business at Springfield, in the county of Robertson; the defendant bank was located and did business at Clarksville, in Montgomery County. The check, which had been received by the complainant bank, and passed to the credit of defendant bank, as above stated, on December 8, 1888, was ascertained, thirty-one days thereafter, to be a forgery, this discovery being made by the depositor, Young, when he came to examine his pass-book, together with the checks returned therewith. Thereupon the complainant bank canceled the charge against Young, the depositor, and at once notified the defendant bank of the forgery, and demanded that the same be made good by the defendant bank. Upon refusal, complainant filed this bill to recover the amount of the check as having been paid by it, through mistake, upon the forged check, charging in the bill the facts above stated, and also the further fact that, when presented, the check bore the indorsement of the defendant bank, and that upon the faith of such indorsement, the complainant's teller accepted the check, and gave credit to the defendant bank, with less careful scrutiny of the genuineness of the drawer's signature, by reason of the confidence reposed in the genuineness of the paper as evidenced by the indorsement of the defendant bank. The defendant answered the bill, admitting that it had received and cashed the check, as charged, and stating that it was unable to furnish the name of the party or parties by whom the check had been presented, and to whom it had been paid by it, but presumed that it had required identification; but of this they do not remember. The allegations of the bill were sustained by the proof; but the chancellor, being of opinion that the plaintiff should, at its peril, know the genuineness of the signature of its depositor, refused the relief prayed for, and dismissed complainant's bill, from which complainant has appealed, assigning errors.

The general rule undoubtedly is, that the bank has, at its peril, to know the genuineness of the signature of its depositor; and if it pays a forged check, the loss must fall upon the bank, and not upon the depositor, except in cases where the negligence of the depositor has induced or brought about the payment by the bank. This duty, with reference to the bank, may be said to be an exception to the general rule that money paid by mistake can be recovered, and to the general

statement of another equally well-settled rule that the payment of a forged paper conveys no title; for it is well settled that the deposit of a forged bill or base coin creates no indebtedness, although credited to the depositor's account, for the reason that payment in such material could not discharge a debt, and cannot create one. The bank is not only responsible to the depositor, where the check with the depositor's signature forged is paid by the bank (except where the depositor has been guilty of negligence sufficient to mislead the bank), but the bank is precluded from recovering from a party to whom a forged check has been paid, where such party, being without fault, would be prejudiced by being required to refund to the bank, upon whom rests the duty of determining the genuineness of the depositor's signature. Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the text-books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check; for, notwithstanding the negligence, to some degree, that the paying bank has been guilty of in paying the forged check, without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence, in purchasing and indorsing the forged paper. The bank upon whom the check is drawn, in the practical administration of banking business, may well be lulled to a less careful scrutiny of its depositor's signature of a check, where the same is indorsed by another bank with which it is in correspondence or interchange of business, than it would exercise in accepting and paying the same check, not so indorsed, to a stranger. The indorsement of the check, by the payee, may be said, ordinarily, to be a guaranty of the genuineness of the indorsements theretofore on the paper, and also of the genuineness of the drawer's signature, subject, perhaps, to some exception in particular cases, as, for instance, where the indorsement is made after the genuineness of the preceding signatures has been approved by the paying bank. Applying these principles to the case at bar, we are of opinion, and so adjudge, that the first fault was with the defendant bank. This bank accepted and cashed a check drawn on a bank in another county, to which the name of the drawer and the

payee had both been forged, and so far as this record discloses, without requiring any identification of the parties to whom such payment was made; certainly without reserving any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant bank, upon receiving such check, in due course of mail, for deposit to credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and if not, that the indorsement would stand as a guaranty to the paying bank from loss that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser. Such would not only seem to be sound in theory, and supported by authority, but is in accordance with the proof in this case, and it is a matter of such general information that perhaps the court might be warranted in taking judicial knowledge of it, that in dealings between banks, and especially with reference to clearings and clearing-houses, banks will adjust and pay differences between each other, or between itself and the clearing-house, upon the faith of the indorsement, by other banks, of the checks involved in such settlement, before they examine the signature to the checks involved or embraced in the settlement, relying on such indorsements as protecting it in such payment should a subsequent and more careful scrutiny of the signatures disclose forgeries in the making and indorsing of the checks so paid.

Mr. Daniel, in his work on negotiable instruments, after discussing and criticising the cases that are supposed to hold a bank liable at all hazards, and to the last extremity, where it pays the check with the signature of its depositor forged, lays down the rule substantially as we have above stated it: 2 Daniel on Negotiable Instruments, secs. 1655, 1655a, 1656, and 1657, with cases cited in the notes.

And the rule is stated by the learned contributor to the article on forged checks in 3 Am. & Eng. Ency. of Law, p. 228, as follows: "Where, however, the loss has been traced to the fault or negligence of the drawer or holder, it will be fixed upon him." See cases cited in note 1.

And on page 225 of 3 Am. & Eng. Ency. of Law, it is said: "Also, the holder, by indorsing a check, warrants the genuineness of all prior indorsements." See note 1, citing numerous

cases, amongst which is the case of *Harris v. Bradley*, 7 Yerg. 310, where Judge Green lays down the doctrine as to the effect of an indorsement in guaranteeing the genuineness of prior indorsements in the language as quoted. It is true that in the Yerger case the language was used with reference to a note, and not a check, and such may also be the case with other of the authorities cited in said note which we have not examined. Now, while we concede that there is quite a difference between this rule as applicable to indorsers on commercial paper and as applied to checks, so far as the liability of the drawee is concerned, yet we see no reason why the bank should not have the benefit of such rule, where the indorsement is made under circumstances which establish or impute negligence to the indorser. The cases of *Levy v. Bank of United States*, 4 Dall. 234, and *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, are relied on as authority for the judgment of the chancellor in the case at bar. The facts of the case in 4 Dallas are so briefly stated as to leave us uninformed as to the manner in which the question was presented. The case of *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, was where a forgery was by raising the notes of the defendant bank; the notes, coming in due course to the United States Bank, were presented to the Bank of Georgia, and passed to the credit of the United States Bank. Nineteen days thereafter, the forgery was discovered, and notice given. Upon refusal of the United States Bank to make good the loss, the credit was, by the Georgia Bank, withdrawn from the account, and the United States Bank brought its suit for money had and received. It was held that the plaintiff could recover. While the reasoning of the learned judge and much of the argument tends to sustain the contention of the defendant here, still, the court put its judgment in that case distinctly "upon the ground that the defendants were bound to know their own notes, and having received them without objection, they cannot recall their assent." While these two cases are criticised by Mr. Daniel as unsound, that criticism, so far as the latter case is concerned, may be well confined to the argument contained in the opinion; for the point decided is in no manner hostile, as we understand it, to the principle as announced by Mr. Daniel, and adopted by us in the disposition of the case at bar; for there is nothing to show that there had been any negligence on the part of the United States Bank in receiving the notes of the Georgia Bank, and we can well understand how

there could and ought to be a higher obligation upon the bank to know the genuineness of its notes of issue passing current as money than rests upon it to know the signature of the depositor on a check indorsed by a solvent correspondent. But putting them both on the same footing, there is wanting in the report of the case in 10 Wheaton any evidence of negligence on the part of the United States Bank.

The view we have expressed, and the principle upon which we reverse the chancellor, and award judgment here for complainant, is not only sustained by Mr. Daniel, but also by Mr. Chitty, Mr. Parsons, and Mr. Bolles, who fortify their conclusions by ample authority: See Chitty on Bills, 13th Am. ed., *431, *485; 2 Parsons on Notes and Bills, 80; Bolles on Banks and Depositors, sec. 189; *Hardy v. Chesapeake Bank*, 51 Md. 585; 34 Am. Rep. 325; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96, 112; *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; 74 Am. Dec. 438; *National Bank of N. A. v. Bangs*, 106 Mass. 441; 8 Am. Rep. 348; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *First National Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104.

It results, therefore, that the decree of the chancellor must be reversed, and judgment rendered here for the amount of the check, with interest and costs.

SNODGRASS, J., concurred in the result, on account of the negligence of the indorsing bank, but dissented from what might be implied from the argument of the prevailing opinion, that that bank would have been liable had it not been negligent, but had taken the check from a known and good-faith indorser. The view taken in the case in 4 Dallas is a sound one. As between itself and good-faith indorsees the paying bank should be the place of final settlement, where all prior mistakes and forgeries should be corrected. If they were not then corrected, the acceptance and payment should be treated as final. The paying bank and the time of payment are the proper place and time to settle and end these things as to innocent indorsers. If the paying bank fails to perform its duty to itself, to its depositors, and to all indorsers and parties interested, by then settling all questions that could arise, it should take the consequences. It will not do to say that the paying bank does not injure an indorsing bank by payment and delay. Any delay may be, and much delay must be, injurious. Nor is this question affected by the clearing-house arrangement. Banks are represented there as well as at their own counters, and they should not be allowed to escape liability for failure to exercise the usual care to detect errors and forgeries. If the arrangement is not safe, they should change it for one that is safe.

RIGHTS AND REMEDIES OF THE SEVERAL PARTIES WHEN A FORGED CHECK HAS BEEN PAID.—It is a well-established rule of law, both in England and in this country, that money paid under a mistake of fact may be recovered back,

however negligent the party paying may have been in making the mistake, where the party who has received the payment has no right to retain the money. And the tendency of the modern authorities is to extend rather than to curtail the operation of this rule. In delivering the opinion of the court in *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211, 215, Rapallo, J., said: "The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are molded so as to do equity between the parties. The exceptions which have been established by authority, and have been ingrafted upon the commercial law, it is not our purpose to disturb; but they should not be extended; unless a case is clearly brought within them, the general principles should govern."

EXCEPTIONS TO THIS RULE. — One generally received exception to the rule stated above is, that where the drawee of a bill of exchange, or the banker upon whom a check has been drawn, pays a bill or check upon which the drawer's signature has been forged, he cannot, upon the discovery of the forgery, recover back the amount, if the party to whom he paid it was a bona fide holder. The drawee is held bound to know the signature of his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss: *Price v. Neal*, 3 Burr. 1355; *Smith v. Mercer*, 6 Taunt. 80; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190; *Laborde v. Consolidated Association*, 4 Robt. (La.) 190; 39 Am. Dec. 517; *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727; 26 Am. Rep. 105; *Commercial and Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; 96 Am. Dec. 554; *Hardy v. Chesapeake Bank*, 51 Md. 562; 34 Am. Rep. 325; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393; *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294; *Star F. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *National Bank of Commonwealth v. Grocers' Nat. Bank*, 25 How. Pr. 412; *Salt Springs Bank v. Syracuse Savings Institution*, 62 Barb. 101; *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Levy v. Bank of United States*, 4 Dall. 234; 1 Binn. 27; 2 Daniel on Negotiable Instruments, 3d ed., secs. 1359, 1655; 2 Morse on Banks and Banking, 3d ed., sec. 463. Alvey, J., in delivering the opinion of the court in *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325, said: "If the bank pays money on a forged check, no matter under what circumstances of caution, or however honest the belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank; for it acts at its peril, and pays out its own funds, and not those of the depositor." The exception under consideration was established by Lord Mansfield in the year 1762 in the case of *Price v. Neal*, 3 Burr. 1355. In that case the drawee of two bills of exchange had paid one bill and accepted and subsequently paid another. After paying them, he discovered that the drawer's signature had been forged, and brought suit against the holder to recover back the money paid. Lord Mansfield stopped the defendant's counsel, saying the case was one that could not be made plainer by argument; that it was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it; that he had made no objection to the bills at the time of paying them; that whatever neglect there was was on his side; and that the misfortune which had happened was without the defendant's fault or neglect. This case became a

leading one, and its authority has been generally accepted, as will be seen by reference to the list of cases cited above. Mr. Justice Story, in delivering the opinion of the court in *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, decided in 1825, referring to *Price v. Neal*, 3 Burr. 1355, said: "After some research we have not been able to find a single case in which the general doctrine thus asserted has been shaken or even doubted." And Allen, J., in delivering the opinion of the court in *National Park Bank v. Ninth National Bank*, 46 N. Y. 81, 7 Am. Rep. 310, referring to *Price v. Neal*, 3 Burr. 1355, said: "But as applied to the case of a bill to which the signature of the drawer is forged, accepted, or paid by the drawee, its authority has been universally and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid. . . . A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded."

DISSENT FROM THE DOCTRINE OF THE EXCEPTION. — Writers of recognized learning and ability have, however, shown a disposition to question the correctness of the principle established by the exception under consideration. Daniel says: "Notwithstanding these high authorities and numerous other cases which decide that the drawee paying a forged draft cannot recover back the amount from the party to whom he paid it, whether such party received it before acceptance or afterward, a distinction has been taken between the two cases which is clearly philosophical, and, as it seems to us, much better calculated to effectuate justice than the doctrine of *Manfield* and *Story*. When the holder has received the bill after its acceptance, the acceptor stands toward him as the warrantor of its genuineness; and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed, the acceptor, being the primary debtor, stands just as the maker of a genuine promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance and payment, the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee, that he holds the bill of the drawer, and demands its acceptance and payment as such. If he indorses it, he warrants its genuineness; and his very assertion of ownership is a warranty of genuineness in itself. Therefore, should the drawee pay it or accept it upon such presentment, and afterward discover that it was forged, he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence": 2 Daniel on Negotiable Instruments, 3d ed., sec. 1361. And subsequently, in discussing the right of a bank to recover money paid on a forged check, he says: "But where the bank discovers the forgery immediately, and demands restitution, offering to return the check, before the holder has lost anything by regarding the matter as all right, we cannot help thinking that it should be entitled to recover back the amount. Mr. Chitty seems to have had the same opinion, and Professor Parsons has expressed it in favorable terms. And the better doctrine, as we think, is, that the bank should have the right to recover, unless the circumstances of the holder had been changed so as to render it unjust. Forgeries often deceive the eye of the most cautious expert; and when a bank has been so deceived, it is a harsh rule which compels it to suffer, although no one has suffered by its being deceived. It is also a rule which tends to render those who trade for checks incautious, if by any means they can procure their payment by the bank. Parties often pronounce forgeries of their own signatures genuine. Why blame a third party so severely? And why

make an exception to a rule so just in its universal application": 2 Daniel on Negotiable Instruments, 3d ed., sec. 1655 a.

Professor Parsons, discussing the same subject, says: "We think the law must be this: the bank can recover it from the payee if the payee were in fault, or if an innocent payee will then be in no worse condition than if the bank had refused to pay it": 2 Parsons on Notes and Bills, 80. And Chitty, discussing the case of the payment of a forged bill of exchange, says: "It may be observed that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument even of the drawer or indorsers themselves; and if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason why he should profit by the accidental payment when the loss had already attached upon himself, and why he should be allowed to retain the money when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation or occasioned any delay or prejudice": Chitty on Bills, 13th Am. ed., 435, *431. The reasoning of the writers of the extracts quoted above seems sound and just, and the tendency of modern authorities is to limit and pare down the application of the exception, rather than to extend its operation: See 2 Morse on Banks and Banking, secs. 463 et seq.

FATE OF THE EXCEPTION IN PENNSYLVANIA.—Pennsylvania was the first state to recognize and adopt the exception under discussion, in the case of *Levy v. Bank of United States*, 4 Dall. 234, 1 Binn. 27, and it is also the first state to abrogate the exception by legislative enactment. The act of April 5, 1849, of that state, provides that "whenever any value or amount shall be received as a consideration in the sale, assignment, transfer, or negotiation, or in payment, of any bill of exchange, draft, check, order, promissory note, or other instrument negotiable within this commonwealth, by the holder thereof, from the indorsee or indorsees, or payer or payers, of the same, and the signature or signatures of any person or persons represented to be parties thereto, whether as drawer, acceptor, or indorser, shall have been forged thereon, and such value or amount by reason thereof erroneously given or paid, such indorsee or indorsees, as well as such payer or payers, respectively, shall be legally entitled to recover back from the person or persons previously holding or negotiating the same the value or amount so as aforesaid given or paid by such indorsee or indorsees, or payer or payers, respectively, to such person or persons, together with lawful interest thereon from the time that demand shall have been made for repayment of the same." In Pennsylvania, therefore, there is no longer any doubt but a bank paying out money by mistake on a forged check or draft may recover it back: *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205; *People's Savings Bank v. Cupps*, 91 Pa. St. 315.

LIMITATIONS AND MODIFICATIONS OF THE EXCEPTION.—In the present condition of the question, it is not easy to definitely state when a case may be said to fall without the exception, and consequently to come within the rule that money paid by mistake may be recovered back. But an analysis of the modern cases will, we think, show that where there has not been absolute good faith on the part of the payee in communicating circumstances of suspicion known to him at the time of payment, and not known to the drawee, the money may be recovered back; so where the holder has been negligent

in not making due inquiry as to the validity of the check or draft before taking it, and the drawee, having the right to presume that the holder had made such inquiry, is excused from making inquiry before paying it, the money paid may be recovered back; so, too, where the loss had already attached before the forged bill or check was paid, and the drawee has given immediate notice to the holder and indorser after discovering the forgery, he may recover back the money paid; and, generally, that the exception applies only to cases where the party who received the money on the forged check or draft has in no way contributed to the consummation of the fraud, or to the mistake of fact under which the payment was made: *First National Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104; *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; 74 Am. Dec. 438; *De Feriet v. Bank of America*, 23 La. Ann. 310; 8 Am. Rep. 597; *National Bank of North America v. Bangs*, 106 Mass. 441; 8 Am. Rep. 349; *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Roucant v. San Antonio Nat. Bank*, 63 Tex. 610; *United States v. National Park Bank*, 6 Fed. Rep. 852; *Wilkinson v. Johnson*, 3 Barn. & C. 428; 2 Daniel on Negotiable Instruments, 3d ed., sec. 1657.

The case of *First National Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104, was an action brought by Ricker to recover back the amount of a forged check paid by him to the defendant, the First National Bank of Quincy. The check purported to have been drawn by Manning Brothers upon Ricker's bank and was payable to the order of Hundrack & Co. The latter deposited the check in the defendant's bank, and drew against it nearly the full amount of it. Directly after, the defendant had reason to doubt the genuineness of the signature to the check, and sent it by one Mills, a clerk, to the plaintiff's bank for payment. Plaintiff's teller said that he was not familiar with the drawer's signature, but that if Mills would indorse it for his bank he would pay it. Mills indorsed it, got the money, and returned it to the defendant, and informed his cashier of what he had done, and the cashier replied it was all right. The check was discovered to be a forgery, and notice of that fact was given in a few hours after the payment was made, and the plaintiff offered to return the check, and demanded back the money paid. The plaintiff had judgment in the court below, and the supreme court affirmed the judgment. Scott, J., who delivered the opinion of the court, referring to the exception under discussion, said: "The rule, however, presupposes the good faith of the transaction, that the holder was a purchaser *bona fide* for a valuable consideration; for the law certainly is, the drawee or payer can recover where the payee or holder is himself at fault, or has been guilty of fraudulent practices which may have thrown him off his guard. . . . There is wanting in this case that element of good faith that is to be found in nearly all the adjudged cases where a recovery has been denied. It is doubtless true, the appellant bank received the check in the usual course of business of Hundrack, without any suspicion it was a forgery. But when it was presented for payment the bank officers had every reason to believe it was spurious. . . . Without imparting the information in their possession, the check was presented at appellee's bank. . . . No one can believe appellee would have paid the check had his teller been put in possession of the facts then known to the officers of the appellant bank or the Union Bank. The cashier was in possession of such facts as made it morally certain at least that it was a forgery, before he sent the check to appellee's bank for certification. This information was withheld. Was this good faith? These facts rendered it 'against conscience'. . . for appellant to retain appellee's money." The

learned judge also said: "The forger had fled before the check was presented, and hence it cannot be said that the delay worked any injury to appellant, or prevented the bank from securing itself, or that the payment, if retracted, made its condition any worse than if appellee had refused payment in the first instance."

In *De Fries v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597, the plaintiff kept a bank account with the defendant bank, his book-keeper kept the cash account and made the deposits, etc., and his relations toward the plaintiff were well known to the bank. This book-keeper forged the plaintiff's name to a check for two thousand five hundred dollars, and as that sum exceeded his deposit, the bank notified him and showed him the check. He denied having signed the check, but did not denounce it as a forgery, and after seeing the book-keeper, reported to the bank that it was all right. Some time after, the book-keeper forged another check of the plaintiff for seventeen hundred dollars, and the bank paid it. On discovering this, the plaintiff denounced the second forgery. It was held that the plaintiff's act in ratifying the first forgery exonerated the bank for having paid it; that his subsequent retention of the book-keeper in his employ misled the bank and threw it off its guard; and that as he had ratified the first forgery, the bank was excused for paying the second check, and he must therefore bear the loss.

Howell, J., in delivering the opinion in that case, said: "We are led to the conclusion that the peculiar facts and circumstances of this case, taken together, must relieve the bank from the stringent rule that the depository must take care to pay none but the checks or drafts of the depositor himself, or his acknowledged special agent, and that this is a proper case to apply the equitable principle that where one of two innocent parties must suffer, it should be he who was the cause or occasion of the confidence and consequent injury of the other."

In the case of *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, the firm of E. D. & G. W. Bangs & Co., the defendants, on September 21, 1869, sold some gold to a person who gave them in return a check on the plaintiff bank payable to their order, signed W. D. Bickford. This check was on the same day indorsed by them in blank and deposited with their bank for collection. On the next day, it was passed through the clearing-house, and paid in the ordinary course of business by the plaintiff bank, of which W. D. Bickford was a customer and depositor. On October 4, 1869, Bickford, upon examining the checks sent to him by the bank two or three days before, pronounced this a forgery, and informed the bank of it, and on the same day the bank notified the defendants that the check was forged. The plaintiff was held entitled to recover back the money paid by it. Wells, J., delivering the opinion of the court, said: "The check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it, the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction, to the inception of which the defendants were parties. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name. But to the defendants the presentation, by a stranger or third party, of a check purporting to be drawn to their own order, which such third party proposed to negotiate to them for value, was a transaction which should have aroused their suspicions. It ought to have put them upon inquiry for ex-

planations; and if inquiry had been properly made, it would have disclosed the fraud, and prevented the success. The case finds that they acted in good faith. But that does not exclude such omission of due precautions as to deprive them of the right to throw the loss upon another party, who acted in like good faith, and also without fault or want of due care."

In the case of *Ellis v. Ohio L. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610. a check drawn upon one bank was presented to another, within a short distance of the former, and was discounted, without asking any questions of the presenter as to who he was or as to his right to the check. Later in the day, this check was presented to the drawee bank by the discounting bank, and was paid without examination. Ten days later, the check was discovered to be a forgery, and the discounting bank was so notified. In an action by the drawee bank to recover back the money paid, the plaintiff introduced evidence to show a custom among the banks of the city to inquire, when a stranger presented a check to the bank other than the one on which it is drawn, "in reference to his right to the check, and the identity of the person," and that there was "not generally so strict a scrutiny when checks came from other banks, it being presumed that caution had already been exercised." It was held that the plaintiff could recover, as the bank which discounted the check had been negligent in not making the proper investigation as to the validity of the check, and that the drawee was excused from making such inquiry, it having a right to presume that the discounting bank had done so. Ranney, J., who delivered the opinion of the court in that case, said: "To entitle the holder to retain the money obtained by mistake upon a forged instrument, he must occupy the vantage-ground by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and especially if the failure to detect the forgery, and consequent loss, can be traced to his own disregard of duty in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with a good conscience retain it. To allow him to do so would be to permit him to take advantage of his own wrong, and to pervert a rule designed for his protection against the negligence of the drawee into one for doing injustice to him."

In the case of *McKleroy v. Southern Bank of Ky.*, 14 La. Ann. 458, 74 Am. Dec. 438, one Zimmer, assuming the name John Belmont forged a draft on the plaintiffs in the name of James Smith, a planter residing in the state of Arkansas. He also forged a letter of introduction in Smith's name to Shotwell and Son, of Louisville, Kentucky, whose house had been in correspondence with Smith for many years. Shotwell and Son, being deceived by the forger, indorsed the draft, to enable the holder to negotiate it. The draft, bearing the indorsements of John Belmont and of Shotwell and Son, was then presented to the Southern Bank of Kentucky for discount, and being considered good, was purchased by it. The draft was then remitted to the Louisiana State Bank, with this additional indorsement upon it: "Pay to R. J. Palfrey, cashier. J. B. Alexander, cashier," and in this form was presented to the plaintiffs, and accepted and paid at maturity to the defendant's agent. A few weeks after, James Smith, upon going through his account with the plaintiffs, informed them that the draft was a forgery, whereupon they gave prompt and formal notice to the banks and to Shotwell and Son. The suit was

afterwards brought to recover back the money paid on the draft. The supreme court gave judgment for the plaintiffs, holding that as the loss had already occurred before the bill was either accepted or paid the holder had suffered no loss, and it ought not to be permitted to profit by the mere accident of payment. See also *National Bank of Commerce v. National M. B. Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232.

In *Roussell v. San Antonio Nat. Bank*, 63 Tex. 610, the holder of a check signed by a person in a certain name took it from the person, although he had previously taken from him a check signed in a different name. On presenting the check, which proved to be a forgery, to the bank for payment, he did not mention this fact, and he was held bound to repay the money, because of his neglect to impart this knowledge of suspicious circumstances at the time he received the money.

THE EXCEPTION NOT GENERALLY APPLICABLE TO RAISED OR ALTERED CHECKS OR DRAFTS.—The exception applies only to cases in which the drawer's signature to a check or draft has been forged. It does not apply to cases where the forgery consists in altering the body of the check or draft. The bank or drawee is not bound to know the handwriting in the body of the instrument. Where, therefore, money is by mistake paid by a bank upon a raised or altered check, or by a drawee upon a raised or altered draft, neither party being in fault, it may generally be recovered back, as paid without consideration; but if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1661; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Redington v. Woods*, 45 Cal. 406; 13 Am. Rep. 190; *Parks v. Roser*, 67 Ind. 500; 33 Am. Rep. 102; *Third Nat. Bank of St. Louis v. Allen*, 59 Mo. 310; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; 23 Am. Rep. 129; *Hall v. Fuller*, 5 Barn. & C. 758. But see *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 180; 26 Am. Rep. 92.

In delivering the opinion of the court in *Marine Nat. Bank v. National City Bank*, 59 N. Y. 77, 17 Am. Rep. 312, Allen, J., said: "Moneys paid upon checks and drafts which have been forgeries, either in the body of the instrument or in the indorsements, or in any respect, except the name of the drawer, have uniformly been held recoverable as for money paid by mistake, and expressly upon the ground that payment, as an admission of the genuineness of the instrument, was the same as an acceptance, and only operated as an admission of the signature of the drawer. The doctrine is applied to cases of bills altered in the body by the raising of the amount for which they were drawn, and also to those in which the name of the payee has been feloniously changed, in several cases, and uniformly applied whenever the question has arisen in this state."

But if a bank on which a raised draft is drawn pays it through mistake, upon its presentation to it by a correspondent bank, as agent, to which it is forwarded for collection, the collecting bank cannot be compelled to repay it, where it has paid over to its principal before notice of the mistake: *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; *National City Bank v. Westcott*, 118 N. Y. 468.

NEGLIGENCE IN FILLING UP CHECK, EFFECT OF. — If the customer of a bank draws his check in such a careless or incomplete manner that a material alteration may be readily made without leaving a perceptible mark, or giving the check a suspicious appearance, he may, if a fraud be perpetrated, be held to suffer the loss. In the case of *Young v. Grote*, 4 Bing. 253, a depositor in a bank, on leaving home, gave to his wife several checks signed in blank, to be filled up according to her needs. She filled up one for fifty-two pounds two shillings, but began the word "fifty" with a small letter, and wrote it in the middle of a blank line. In writing the figures in the margin, she also left a considerable space between the mark "£" and the figures "52." She gave the check in this form to her husband's clerk, to get the money, and he inserted the words "three hundred" before the "fifty," and the figure "3" before the figures "52," and drew £352 upon it. The court held that the loss must be borne by the drawer, because the careless drawing of the check had made the forgery easy and simple; 2 Daniel on Negotiable Instruments, 3d ed., sec. 1659; 2 Morse on Banks and Banking, 3d ed., sec. 480. But a merchant is not guilty of such negligence as will render him liable on his check in the hands of a holder in good faith, and for value, in sending to the post-office, by a clerk who knew its contents, a sealed letter containing such check, which was made payable to order, and which check the clerk abstracted, and passed, after altering it by forging the words "or bearer," and obliterating the words "or order": *Belknap v. National Bank of North America*, 100 Mass. 376; 97 Am. Dec. 105. And in *Mackintosh v. Eliot National Bank*, 123 Mass. 393, it was held that a bank which pays out money on a check purporting to be signed by a depositor, but the signature on which is in fact forged by his clerk, is not, in the absence of evidence that the clerk had, or was supposed by the bank to have, authority to sign the depositor's name, exempt from liability to the depositor, by proof that the forgery was committed on a blank form taken from the depositor's check-book, which was left lying about in his office during the day; that it was stamped with a hand-stamp, sometimes used on his checks, and which was accessible to any one in the office; that the clerk was allowed to fill up checks, and was introduced by the depositor to the officers of the bank as the person who was authorized to receive money on the depositor's checks.

It is a general rule that if the loss can be traced to the fault or negligence of any party, it will be fixed upon him: 2 Daniel on Negotiable Instruments, 3d ed., sec. 1657; *First National Bank v. Tappan*, 6 Kan. 456; *Gloucester Bank v. Salem Bank*, 17 Mass. 32; *Clews v. Bank of N. Y. Nat. B. Ass'n*, 114 N. Y. 70. In the case last cited, a draft upon defendant was indorsed by the payee and mailed to the indorsee. It never reached him, but fell into the hands of a knave, who presented it to defendant to be certified. A memorandum showing the number and amount of the draft, and that it was certified, was entered in a register kept by the defendant. The drawer notified the defendant by letter of the loss of the draft, and not to pay it. The defendant then added to the memorandum: "Stop pay't; see letter." Subsequently, the knave raised the amount and changed the date and the name of the payee, and offered it to the plaintiffs in payment for certain bonds. In an action to recover the amount of the draft as raised, plaintiffs proved that they sent their messenger to the defendant to ascertain whether the certification was good. The person in attendance answered, "Yes," without referring to the register; and upon the messenger's return with this reply, the plaintiffs received the draft in payment for the bonds. The court held that there was sufficient evidence to justify the finding that the defendant was negligent in

failing to disclose the facts to the plaintiffs' messenger, and to authorize a recovery. But in *Goddard v. Merchants' Bank*, 4 N. Y. 147, the plaintiffs, in New York City, being informed that the draft of the drawer, residing in Ohio, had been protested, went to the notary to take it up, and the notary being out, left a check for the amount and the notary's fees. The notary paid the bank and got the draft, which plaintiffs discovered to be a forgery as soon as it was shown to them. It was held that they could recover back the money paid, and that they were not negligent, under the circumstances, in paying the money without seeing the draft.

MONEY PAID UPON FORGED INDORSEMENT OF CHECK OR DRAFT may be recovered back. The bank or drawee is not bound to know the signature of an indorser. And the holder, whether he indorses the instrument or not, warrants the genuineness of all prior indorsements. If, therefore, a check or draft upon which the name of a prior indorser has been forged is paid, the amount may be recovered back from the party to whom it has been paid, or from any party who indorsed it subsequent to the forgery.

And if a check is drawn payable to the order of an existing person, and the indorsement of such person is forged, and thereafter payment is made by the bank, such payment will be no acquittance to it. A payment made otherwise than according to the depositor's directions is no discharge of the bank's obligations to him: 2 Daniel on Negotiable Instruments, sec. 1663; 2 Morse on Banks and Banking, sec. 474; *Atlanta Nat. Bank v. Burke*, 81 Ga. 598; *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481; 74 Am. Dec. 442; *Leroy v. Bank of America*, 24 La. Ann. 220; 13 Am. Rep. 124; *Lennox v. Brainard*, 36 Minn. 330; *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294; *Star F. I. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Buckley v. Second Nat. Bank*, 35 N. J. L. 400; 10 Am. Rep. 249; *Johnson v. First Nat. Bank*, 6 Hun, 124; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coggill v. American Exchange Bank*, 1 N. Y. 113; 49 Am. Dec. 310; *Morgan v. Bank of State of New York*, 11 N. Y. 404; *Turnbull v. Bowyer*, 40 N. Y. 456; 100 Am. Dec. 523; *Thomson v. Bank of B. N. A.*, 82 N. Y. 1; *Citizens' Nat. Bank v. Importers' and Traders' Bank*, 119 N. Y. 195; *Shaffer v. McKee*, 19 Ohio St. 526; *Dodge v. National Ex. Bank*, 20 Ohio St. 234; 5 Am. Rep. 648; 30 Ohio St. 1; *Pickle v. Muse*, 88 Tenn. 380, *post*, p. 900; *Leather Mfrs. Bank v. Merchants' Bank*, 128 U. S. 26.

If, however, the drawer puts in circulation a draft or check, with the indorsement of the payee already upon it, and it is purchased in the market by a *bona fide* holder, who presents it to the drawee, by whom it is paid, the drawee cannot recover back the money he paid to such *bona fide* holder: *Hortman v. Henshaw*, 11 How. 177; *Star F. I. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Meacher v. Fort*, 3 Hill (S. C.) 227; 30 Am. Dec. 364; *York Bank v. Asbury*, 1 Biss. 233; 2 Morse on Banks and Banking, sec. 476. And where the drawer of a bill of exchange payable to order himself indorses the bill, and passes it to a bank, which discounts it, and collects the amount from the drawee, the latter cannot recover back from the bank the money paid to it by him: *Coggill v. American Ex. Bank*, 1 N. Y. 113; 49 Am. Dec. 310. Bronson, J., in delivering the opinion in this case, said: "A *bona fide* holder may treat it as a bill payable to bearer. The bank had a good title to the bill as against the drawers and the payee, and that was a good title against all the world. No one is injured by this doctrine. The bill has answered the end for which it was drawn. The plaintiff has paid money for the drawers in pursuance of their request; and he has the same remedy against them that he would have had if the indorsement had been genuine."

CERTIFICATION OF CHECK, EFFECT OF, ON RIGHTS OF BANK PAYING FORGED CHECK. — The better opinion is, that a bank, by certifying a check, either verbally or in writing, warrants only the genuineness of the drawer's signature, and that it has funds to meet the check; that it does not thereby warrant the genuineness of the body of the check, or of any indorsement upon it; and that if there has been any fraudulent alteration, or forged indorsement, prior to the certification, the certification is not binding. And if the bank afterwards, through mistake, pays the sum to which the check has been raised, it may recover back the difference between that and the original sum for which it was drawn: 2 Daniel on Negotiable Instruments, sec. 1603; 2 Morse on Banks and Banking, sec. 482; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Park v. Roser*, 67 Ind. 500; 33 Am. Rep. 102; *National Bank of Commerce v. National M. B. Ass'n*, 55 N. Y. 211; 14 Am. Rep. 232; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *Security Bank v. National Bank of the Republic*, 67 N. Y. 458; 23 Am. Rep. 129; *contra*, *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189; 26 Am. Rep. 92.

NOTICE OF FORGERY AND DEMAND FOR RESTITUTION, WHEN TO BE GIVEN OR MADE. — It is only reasonable that a party who has paid money on a forged instrument, and seeks to recover it back, should be required to give notice of the forgery, and make demand of restitution within a reasonable time. The earlier cases, both in England and in this country, required notice to be given with very great promptitude: *Cocks v. Masterman*, 1 Barn. & C. 902; *Smith v. Mercer*, 6 Taunt. 76; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of St. Albans v. Farmers' and Mechanics' Bank*, 10 Vt. 141; 33 Am. Dec. 188; 2 Daniel on Negotiable Instruments, sec. 1371; 2 Morse on Banks and Banking, sec. 488. In *Cocks v. Masterman*, 1 Barn. & C. 902, a delay of one day was held to be fatal.

But the doctrine established by the great weight of modern authority in this country is, that mere lapse of time in the abstract, however long, will not bar the right of the party to allege the forgery, and recover back the money paid, provided he gives notice and makes demand within a reasonable time after he discovers the forgery: 2 Daniel on Negotiable Instruments, sec. 1372; 2 Morse on Banks and Banking, sec. 487; *Schroeder v. Harvey*, 75 Ill. 468; *First Nat. Bank v. Tappan*, 6 Kan. 456; 7 Am. Rep. 568; *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Corn Ex. Bank v. Nassau Bank*, 1 N. Y. 74; 43 Am. Rep. 655; *Ellis v. Ohio L. I. & T. Co.*, 4 Ohio St. 628. But in *Weinstein v. National Bank*, 69 Tex. 38, 5 Am. St. Rep. 23, it was held that a bank is not liable to a depositor for money paid on forged checks, where, by reason of the depositor's negligence and delay in examining his account and reporting the forgeries, the bank loses the opportunity of recovering the money which it would have had, if the discovery and report had been made in a reasonable time.

PICKLE v. MUSE.

[88 TENNESSEE, 380.]

POSSESSION OF BANK CHECK BY DRAWER PRIMA FACIE EVIDENCE OF PAYMENT. — Possession by the bank upon which it was drawn of a check payable to a particular person or order raises a presumption that it was paid to the payee therein named. But such presumption is rebutted by the positive and uncontradicted testimony of the payee that he in fact never did collect the check, or authorize any one to collect it for him.

BANK CHECK RETURNED TO DRAWER VOUCHER OF PAYMENT WHEN. — A bank check returned to the drawer after being paid and debited to his account with the indorsement of the payee, is a voucher for such payment in favor of the drawer against the payee; but without such indorsement it is not evidence, as between drawer and payee, of such payment.

ACCEPTANCE OF BANK CHECK NECESSARY TO MAINTAIN SUIT AGAINST BANK. — The holder of a bank check cannot sue the bank for refusing payment thereof, in the absence of proof that the bank accepted the check, or did some other act equivalent to and implying acceptance.

ACCEPTANCE OF BANK CHECK, WHAT IS SUFFICIENT EVIDENCE OF. — The acceptance of a bank check and assent to the payment thereof may be inferred from proof of the fact that the bank received and retained it when presented at its counter, and subsequently charged the check to the account of the drawer, and settled with him, deducting the amount of it. And the bank cannot escape liability to the payee for the amount of the check by saying that what it did in receiving the check and in paying it, and in debiting to the account of the drawer, was all through mistake; for that would be to suffer it to escape the consequences of its own mistake by pleading its own negligence as a defense.

DELIVERY OF BANK CHECK ESSENTIAL TO PAYEE'S RIGHT TO RECOVER THEREON. — The payee of a bank check cannot maintain an action thereon against the bank on which it is drawn, unless it has been delivered to him by the drawer.

RATIFICATION OF UNAUTHORIZED DELIVERY OF BANK CHECK. — The payee of a bank check may adopt and ratify an unauthorized delivery of the check to a stranger who, without authority, presents it to and receives payment thereof from the bank on which it is drawn. And the bringing of suit by the payee is a sufficient ratification by him of the unauthorized delivery.

AUTHORITY TO RECEIVE CHECK PAYABLE TO ORDER IMPLIES NO AUTHORITY TO INDORSE IT in the name of the payee, or to collect it without such indorsement.

BILL in equity. The opinion states the case.

Cooper and Frierson, for appellant.

Myers and Dayton, and Ivis and Ivis, for the respondents.

LURTON, J. This is a bill in equity to recover the sum of six hundred dollars, which complainant charges is due to him from either the People's National Bank or John T. Muse, both of whom are made defendants. The bill, in substance, alleges

that Muse, being indebted to complainant in the sum of six hundred dollars, claims, on March 26, 1887, to have paid the debt in a check drawn by himself against his account with the defendant bank, payable to complainant or his order, and that the check has been paid by the bank and charged up against his account. The defendant bank claims that the check was presented to it for payment by complainant in person, and that it was paid to him. Complainant charges that the check has never been paid to him or to his order, or to any one authorized by him. Upon these facts he prays for a decree against the defendants, or either of them, as the law and facts may justify.

The defendant Muse, in his answer, admits the indebtedness as charged, but insists that he has fully paid same by drawing and delivering his check for the sum of six hundred dollars to complainant, and that this check has been paid by the drawee to Thomas Pickle, and charged up to the account of the drawer.

The answer of the bank admits the drawing of the check, by Muse, payable to Thomas Pickle or order, and claims that it was presented by the payee, and paid to him in person. It admits that the check has never been indorsed by complainant, but insists that it never required the indorsement of such a check when presented for payment by the payee in person. The officers of the defendant bank do not, in their depositions, pretend to any memory as to the payment of this check. They prove that it was the rule and custom of the bank to require the indorsement of all checks drawn against it, where the check is payable to the payee or order, when presented for payment by one other than the payee, but that when presented by the payee in person they do not require his indorsement; that the check in question bears the bank stamp of payment as of March 28, 1887, and has no indorsement; and that, in view of their custom or rule, they would not have paid such check to any one but complainant, unless indorsed by him. They further insist that the possession of such a check raises a presumption that it was paid to the payee named in the check.

The possession of an order by the person upon whom it is drawn is *prima facie* evidence that the articles or money specified therein were delivered or paid according to the order: *Kincaid v. Kincaid*, 8 Humph. 17; 2 Daniel on Negotiable Instruments, sec. 1647.

This presumption is, however, rebutted by the positive and uncontradicted testimony of complainant that he in fact never did collect the check or authorize any one to collect it for him. We have carefully considered all the circumstances relied upon by the defendants as tending to support the presumption of payment to complainant in person, and are of opinion that the weight of proof is, that the check has never been paid to complainant. The custom of the defendant bank to pay such checks as the one now under consideration to the payee without his indorsement is the occasion of this litigation. The contrary is the usage of commerce. Such a check, returned to the drawer when paid, and debited to his account, with the indorsement of the payee, would be a voucher for such payment in favor of the drawer against the payee; but without such indorsement it would not be evidence, as between drawer and payee, of such payment: 2 Daniel on Negotiable Instruments, sec. 1648.

The almost universal custom of business is to make checks payable to the payee or order, for the purpose of making the check a voucher for the payment. So the indorsement by the payee would furnish the banker very high evidence of payment in accordance with the direction of the drawer.

A check drawn in favor of a particular payee or order is payable only to the actual payee, or upon his genuine indorsement; and if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible: *Morgan v. Bank*, 11 N. Y. 404; 2 Daniel on Negotiable Instruments, secs. 1618, 1663; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 343.

This brings us to the question as to whether complainant can recover upon this check as against the bank. While the authorities are not agreed, yet the decided weight of opinion is, that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it has done some other act equivalent to and implying acceptance. This has been the uniform view of this court: *Planters' Bank v. Merritt*, 7 Heisk. 177; *Planters' Bank v. Keese*, 7 Heisk. 200; *Imboden v. Perrie*, 13 Lea, 504.

In the latter case the reasons for this doctrine are forcibly stated and the authorities collated by Judge Turney. We are unable to see any reason for disturbing the rule as heretofore declared by this court, especially as the decided weight of

authority is in accord with our decisions: *Bank of Republic v. Millard*, 10 Wall. 152; *First National Bank of Washington v. Whitman*, 94 U. S. 343; *Carr v. National Sec. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Seventh Nat. Bank v. Cook*, 73 Pa. St. 485; 13 Am. Rep. 751; *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353; *Purcell v. Allemong*, 22 Gratt. 742.

Has there been any acceptance by the defendant bank of the check in question? It is argued that the check having been charged up to the account of the drawer and returned to him, is tantamount to an acceptance. The authorities are not agreed as to the effect of such an act. The case of *National Bank v. Millard*, 10 Wall. 157, was the case of a payment made of a check upon a forged indorsement. It did not appear that the check had been charged to the drawer, and there was a judgment in favor of the bank. Mr. Justice Davis, in delivering the opinion of the court, in speaking of the effect of such a charge, said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order and communicated its assent to the drawer, would be considered as holding the money for the plaintiff's use, and therefore under an implied promise to him to pay it on demand."

In the subsequent case of *First Nat. Bank v. Whitman*, 94 U. S. 347, this very question arose, when the court, through Mr. Justice Hunt, held that such a charge, having been made through mistake, and upon the assumption that it had in fact paid the check to one authorized to collect it, would not authorize the presumption of an acceptance and promise to pay it again.

Upon a question of commercial law we should be generally inclined to follow any well-settled line of decisions by the supreme court of the United States, where the question was in this state *res integra*. This question can hardly be regarded as one of commercial law, in the ordinary sense of the phrase. It is rather a question as to the weight and sufficiency of evidence tending to prove an acceptance. We agree that, for want of privity, the holder of a check cannot recover upon it against the bank unless he can show an acceptance.

The question presented is as to the weight to be attached to certain acts done by the bank, and the inferences fairly to be drawn from these acts. Where a bank has negligently paid a check to an improper person, it would seem that, in good conscience, the true owner and payee ought not to be remitted to his action against a possibly insolvent drawer, for thereby he may lose his debt altogether. A legal principle, however, stands in his way, in that there is no privity between himself and the bank until the bank has assented to the order of the drawer requiring it to pay the holder of the check the sum of money named. This assent, which is necessary before there is any contract relation between the holder of the check and the bank, is what is meant by acceptance. This assent need not be by an indorsement of "good" across the check, or by any other particular words, either in writing or oral. The question of assent or acceptance is one of fact, and may be made out by any of the methods by which a fact is proven. Did the defendant bank assent to the direction of its customer to pay out of his funds on deposit the sum named in this check? If so, to whom did it assent to pay this sum? The answer is found by inspection of the check. If it assented to pay this check, it undertook and assumed to pay it to Thomas Pickle, or upon his order. Now, the facts which are relied upon as making out such an assent to the direction of the drawer of this check as to bring complainant into privity with the bank are, that it received and retained the check, and that it has charged the check to the account of the drawer and settled with him, deducting the amount of this check. Now, where a bank certifies a check as "good," it is not only authorized, but good banking would require that such check should be then charged up to the account of the drawer as so much of his funds which they have obligated themselves to pay upon that check. Of course, if the check is never paid, or is returned, the drawer would be credited. The debiting of this check to the account of the drawer would then mean only one of two things: that this check has been paid as ordered, or that the fund is held subject to the demand of the payee. The bank must be taken to have assented to pay it as directed; that is, to the payee or his order. That it has assented to the payment of this check is, we think, to be inferred from the retention of the check when presented at its counter, and the subsequent charge of the check to the drawer.

Upon this charge to the drawer we predicate its assent

or acceptance. It had no right to charge it to the drawer and to settle his account, unless it had either paid the check to the payee named in the check or on his order; or having accepted the check, held the fund of the drawer subject to the demand of the payee. It has not paid the check; it must therefore be held to hold the amount of the check for the payee. It cannot escape this consequence by saying that what it has done in receiving the check and in paying it, and in debiting to the account of the drawer, is all through mistake. That would be to suffer it to escape the consequences of its own mistake by pleading its own negligence as a defense. To allow it to plead its own negligence in answer to the natural inference from its receipt and retention of this check, and its subsequent charge to the drawer, might enable it to shelter itself behind the technical defense of want of privity; but on the other hand, it may result in the loss to complainant of his debt by remitting him to his action against his original debtor, whom he may be unable to coerce into payment. We think there is no inequity in holding the bank to the inference that it has accepted this check, springing out of the fact that it has charged it up to the account of the drawer. This was clearly the view of Mr. Justice Davis, a great master in the law, as appears from his opinion in *National Bank v. Millard*, 10 Wall. 157. It has the support of the only other courts which have been called upon to pass upon this question, — the supreme courts of Pennsylvania and Ohio: *Seventh National Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751; *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353; *Dodge v. National Exch. Bank*, 20 Ohio St. 234; 5 Am. Rep. 648.

So Mr. Daniel, in his very learned work upon negotiable instruments, lends the support of his name to the view we have taken, saying: "There is no doubt that if the bank pays a check upon the forged indorsement of the payee's or special indorsee's name, the payee, or such indorsee, may recover back the amount, if the check had been delivered to him, and the drawer may recover it back if he had not issued it": 2 Daniel on Negotiable Instruments, sec. 1663.

This brings us to the question as to whether this check was ever delivered to the complainant; for it is insisted that if there has been no delivery to him, that he has no such title to the instrument as will enable him to maintain a suit against the bank. Whether this check was sent to complainant and

miscarried, and fell into the hands of a stranger, or whether it was left with the bank, to be credited to the complainant, who kept his account there, and by oversight this credit was not given, is all matter of conjecture. How this check ever reached the bank we are unable, from the proof, to determine. All we can say is, that we are satisfied that it never came into the hands of complainant. Some one undoubtedly received it from Muse. By suing the bank upon this check, complainant may and does ratify the receipt of the check from Muse. It is as if it had been received by an agent for the use and benefit of the complainant. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*: A subsequent ratification has a retrospective effect, and is equivalent to a prior command: Broom's Legal Maxims, 837.

"This is a rule," says Mr. Broom, "of very wide application."

"No maxim," remarks Mr. Justice Story, "is better settled in reason or law than this maxim; . . . at all events, when it does not prejudice the rights of strangers."

As illustrative of the application of the rule, the author cites the case where the goods of A are wrongfully taken and sold. The owner may either bring trover against the wrongdoer, or may elect to consider him as his agent, and adopt the sale and bring an action for the price: *Smith v. Hudson*, 4 Term Rep. 211.

So in another case, it was said "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and by and with all the consequences which follow from the same act done by his previous authority": Broom's Legal Maxims, 837.

The bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified. An agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect it

without such indorsement. In the case of *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648, a certificate of indebtedness by the government to Dodge was remitted by mail to the paymaster for a check. The mail was robbed, and the certificate presented by the thief to the paymaster, and a check demanded. The latter, without requiring proof of the identity of the holder of the certificate, issued a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged, and the check paid. Subsequently Dodge sued the bank, and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. See, to same effect, *Graves v. American Exchange Bank*, 17 N. Y. 207.

The decree of the chancellor is reversed, and judgment for complainant against the bank for the amount of the check and interest from filing of bill, and all the costs of the cause.

SNODGRASS, J., delivered a dissenting opinion, of which the following is a synopsis: He disagreed with the majority upon the merits of the question decided, and was strongly opposed to the policy of refusing to follow the supreme court of the United States on this important banking and commercial question. This question was decided adversely to the opinion of the majority in *First Nat. Bank v. Whitman*, 94 U. S. 347, without dissent by any member of the court. The Millard case was cited in the argument and referred to in the opinion of the court in that case, and the court unanimously held the bank not liable to suit on any ground. That decision commanded his most earnest approval; but there are additional reasons why he thought it should be followed by this court.

1. It is the judgment of the highest court in the country on a general banking and commercial question, where the decision should be treated as conclusive, as on such questions the supreme court of the United States follows no state construction. It is not "rather a question of the weight of evidence," as put by the majority, because all agree that the check in this case was not paid to the payee, and that being determined, the question to be settled is, Can the payee maintain suit against the bank, upon this conceded condition of affairs?

2. The decision should be followed, because it is an original question in this state, and we should make our decision conform to that of the supreme court of the United States, and thereby have but one rule applied to our citizens.

Caldwell, J., joined in the dissent.

NEGOTIABLE INSTRUMENTS — DELIVERY. — Delivery is an essential to the validity of a negotiable instrument: *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319, and note. Compare also *Follier v. Schroeder*, 19 La. Ann. 17; 92 Am. Dec. 521.

CHECKS — NECESSITY OF ACCEPTANCE BY THE BANK. — No action can be maintained on an unaccepted check against the drawee: *Chapman v. White*,

6 N. Y. 412; 57 Am. Dec. 464, and note; *Northumberland Bank v. McMichael*, 106 Pa. St. 480; 51 Am. Rep. 529, and foot-note; *Saylor v. Bushong*, 100 Pa. St. 23; 45 Am. Rep. 353, and note 355-357.

CHECKS—LIABILITY OF BANK TO THE HOLDER OF CHECK.—Where a bank receives a check and charges it against the drawer, and afterwards settles with him upon that basis, the payee of the check may sue the bank for the amount of the check; *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483; 13 Am. Rep. 751, and note.

FRIZZELL v. RUNDLE & Co.

[88 TENNESSEE, 396.]

AUCTIONEER WHO SELLS MORTGAGED GOODS NOT GUILTY OF CONVERSION WHEN.—An auctioneer who, in the regular course of his business, receives mortgaged chattels from the mortgagor, and sells them for him on commission, and pays over the proceeds thereof, without notice, actual or constructive, of the mortgage, is not liable to the mortgagee as for a conversion of the goods, although the mortgagor acted fraudulently in the matter. The registration of the mortgage does not, in such a case, operate as constructive notice to the auctioneer.

TROVER. The opinion states the case.

Frizzell and Zarecor, for Frizzell.

Bryan and Cartwright, for Rundle & Co.

LURTON, J. One Anglin executed to Frizzell, the plaintiff, a mortgage upon his household furniture, to secure the latter as the surety of the mortgagor upon certain rent notes. The property mortgaged was in the residence of the mortgagor, and was to remain in his custody and possession until the maturity of the notes. It was stipulated that should the mortgagor remove or attempt to remove the property, or attempt to sell same, that then the mortgagee should have the right to take possession, and that in such event, or in case default was made in payment of the secured debt, that Frizzell should sell said property, publicly or privately, and apply to payment of debt. The mortgagor obtained consent of the mortgagee to a removal of the property from the residence in which it was to another part of the city, and to another house, upon the statement that he had rented another residence. In place of such a removal, he fraudulently took the mortgaged articles to the auction-house of defendants and caused them to be there sold at public sale.

Rundle & Co. are regular auctioneers, and had no actual

notice of the mortgage upon the property, and they paid over the proceeds of sale to Anglin before notice of Frizzell's right. Having sold the property for cash, and at a sale with many other articles of the same sort, and keeping no memorandum of the buyers, they are unable to state who became purchasers of the mortgaged property. Frizzell has sued them upon these facts, in trover, as for a conversion.

The mortgage made by Anglin was duly registered. This property was sold by defendants in the usual course of their business as auction commission merchants. Unless the registration of the mortgage operates as constructive notice, they must be regarded as innocent agents or factors, who have received the property in the regular course of their business, and sold it as agents for the one who had delivered it to them, and paid over the proceeds to their principal without knowledge of any encumbrance on his title. The case is controlled in this aspect by that of *Roach v. Turk*, 9 Heisk. 708; 24 Am. Rep. 360. Having asserted no lien, claim, or title for themselves against the mortgagee, they cannot be held guilty of conversion.

A different result would perhaps follow if they had been shown to have had knowledge of the true state of Anglin's title. Did the registration of this mortgage operate as constructive notice to defendants? If they assert any title or lien or interest in the mortgaged property, then, beyond doubt, they would be affected by the registration. But they do not; and have not asserted any claim to the mortgaged property whatever. The constructive notice consequent upon registration attaches only to persons who subsequently assert any title, charge, or lien or interest in the property described in the registered instrument, and only in favor of the grantees in such instrument. It is, for instance, well settled that a subsequent purchaser from the grantor will not, as between himself and such grantor, be charged with notice of the state of his vendor's title as shown by the registered title. He may, as between himself and his grantor, rely upon the representations of the latter as to his title, and will not be bound by the registered title of which he has not actual notice: *Napier v. Elam*, 6 Yerg. 108; *Ingram v. Morgan*, 4 Humph. 66; 40 Am. Dec. 626; *Topp v. White*, 12 Heisk. 165.

Defendants having neither actual or constructive notice of the mortgage, and having in the whole matter acted only as the innocent agent and factor of the mortgagor, with whom the

possession had been left, are not guilty of conversion, and the judgment is affirmed.

AUCTIONS. — For the rights, duties, and liabilities of auctioneers, see extended note to *Thomas v. Kerr*, 96 Am. Dec. 264-272.

CARTWRIGHT v. DICKINSON.

[38 TENNESSEE, 676.]

SUBSCRIBERS TO STOCK OF PROPOSED CORPORATION BECOME SHARE-HOLDERS WHEN. — The moment the conditions required by law as preliminary to the granting of a charter to a corporation are complied with, the subscribers to its stock become share-holders, entitled, as such, to a voice in all subsequent proceedings, and at the same time their liability to pay the amount of their shares becomes fixed and absolute.

ISSUANCE OF STOCK CERTIFICATES IS NOT NECESSARY TO MAKE ONE SHARE-HOLDER in a corporation. Such certificates are mere evidences of the ownership of shares.

CORPORATION HAS NO POWER TO FORFEIT, CANCEL, OR ANNUAL SHARES of its stock once lawfully issued, unless its charter authorizes a forfeiture of shares for non-payment of calls. One subscriber can be released from liability only by the consent of all.

UNAUTHORIZED RELEASE OF SHARE-HOLDER NOT AIDED BY OBTAINING NEW SUBSCRIBERS IN HIS PLACE. — The unauthorized release by a corporation of one of its share-holders from the payment of his subscription is not made valid by procuring additional subscriptions to take the place of that released, whether the new subscriptions be void or valid.

CORPORATION CANNOT REDUCE ITS AUTHORIZED CAPITAL BY PURCHASING ITS OWN SHARES for cancellation.

SUBSCRIPTIONS IN EXCESS OF AUTHORIZED CAPITAL OF CORPORATION VOID. — Subscriptions for new shares in the stock of a corporation, after its full authorized capital stock has been taken and subscribed, are null and void.

VIOLATION OF CHARTER OF CORPORATION NO DEFENSE TO ACTION FOR SUBSCRIPTION. — The fact that a corporation has violated its charter is no defense to an action for calls due from a share-holder upon his shares. His remedy is against the corporation to restrain such illegal action.

SHARE-HOLDER OF CORPORATION NOT RELEASED FROM HIS SUBSCRIPTION BY REASON OF HIS OWN MISTAKE. — A shareholder is not released from liability for his subscription, where, through his mistake of law or fact, he supposed his contract of subscription had been properly canceled, and therefore ceased to act as a share-holder in the corporation, although the corporation afterwards became insolvent under management in which he did not participate.

OFFICER OF CORPORATION IS AGENT OF SHARE-HOLDER WHEN. — An officer of a corporation who undertakes for a share-holder to obtain a release or cancellation of his subscription becomes the agent of the share-holder in the matter, and the share-holder, and not the corporation, is responsible for his acts as such agent.

ASSIGNEE OF INSOLVENT CORPORATION, RIGHTS OF, UNDER GENERAL ASSIGNMENT. —An assignee for the benefit of creditors of an insolvent corporation has the right, and it is his duty, to collect unpaid subscriptions due from delinquent share-holders, and apply the proceeds to the payment of the creditors, or pay them over to the assignors, in case there is a surplus. And he has the right to maintain suits necessary for the accomplishment of those objects.

BILL by a creditor of an insolvent corporation to enforce payment out of assets in the hands of the assignee. The opinion states the facts.

Whitman and Gamble, and E. B. Rucker, for Cartwright.

Dickinson and Fraser, for Dickinson.

LURTON, J. The Grubbs Cracker Company is a corporation organized July, 1885, under the general incorporation law of this state. In October, 1887, being insolvent, it made a general deed of assignment to Dickinson, as trustee, to equally secure all creditors. The original bill was filed by Cartwright, claiming to be a creditor of the corporation, for the purpose of enforcing payment out of the assets in defendant's hands. One of the demands set up is not now resisted; the other is contested as being without consideration. The assignee, after answering, filed a cross-bill to recover some six thousand dollars alleged to be due upon unpaid calls on stock owned by Cartwright in the cracker company, and to recover one thousand dollars paid back to him by the secretary and treasurer of that company upon an alleged ineffectual cancellation and rescission of his liability as a subscriber for stock. Cartwright, before the charter was obtained, subscribed for eight thousand dollars of the stock of the proposed corporation. A charter was obtained by the usual application, provided by the act of 1875. The subscribers thereupon met, and organized by accepting the charter, adopting by-laws, and electing directors. He was present at this meeting, and was elected a director, and acted as such for a year thereafter.

The act of 1875 does not require the amount of the capital stock of a corporation to be stated in the application for the charter, but authorizes the capital to be fixed subsequently by by-law. Such a by-law was adopted at the organization, and the capital settled at forty thousand dollars, to be divided into shares of one hundred dollars each. A few days thereafter, Cartwright paid the first call of twenty-five per cent, amounting to two thousand dollars, and took the receipt of the secretary and treasurer for that sum as a payment upon his stock. The remainder

of the sum due (six thousand dollars) he has never paid, and now claims that his contract has been canceled or rescinded, and that he is not liable therefor. The facts upon which this defense is placed are these: In July, 1886, one year after the company had begun business, Cartwright, desiring to withdraw therefrom, spoke to Mr. Grubbs, and asked him to dispose of his stock. Grubbs was the brother-in-law of Cartwright; was the largest stockholder in the corporation, and was its secretary, treasurer, and general manager. Grubbs, it seems, did accordingly undertake to dispose of his stock, which appears at that date to have been salable at par. September 2, 1886, Grubbs told him he had made a disposition of the shares, and by his direction the proper entries were made on the books of the company, by which the balance due as for unpaid calls was charged off, and the two thousand dollars theretofore paid in on first call was credited to the personal account of Cartwright. Of this credit, six hundred dollars was then paid in cash, same being credited on the stock receipt previously taken for amount of first call. Subsequently, this receipt was surrendered, and the note of the corporation executed to Cartwright for the remainder. This note was afterward reduced by payments, and a new note executed, which is the smaller of the two demands upon which the original bill is filed.

What Grubbs did, which he supposed authorized him to rescind the contract by which Cartwright had purchased shares, was this: he went upon the streets and solicited new subscriptions to the stock of his company, and when he had obtained these, he regarded himself as authorized to rescind the contract of Cartwright, and release him from all obligation as a share-holder indebted on account of his shares. To carry out his purpose he caused the books to show that Cartwright, instead of being debtor, was a creditor to the extent of the capital which he was allowed to withdraw.

The proof does not show any transfer of Cartwright's stock to other persons, or any agreement that it should be transferred to others, or that they should be substituted to his rights and liabilities. There is no pretense of the purchase of shares from Cartwright by other persons. On the contrary, they were procured to subscribe for new shares, just as Cartwright had done in the first instance.

Before the organization of the corporation and acceptance of the subscription of Cartwright, the promoters might, perhaps, agree to release a subscriber by substituting other names for

his, and erasing from the list that of the recalcitrant: Cook on Stock and Stockholders, sec. 75. But at the moment when the conditions required by law as preliminary to the granting of a charter were complied with, the subscribers became shareholders, entitled to a voice as share-holders in all subsequent proceedings, and to compel a specific performance of the contract of membership. At the same time all the obligations of a share-holder were assumed, and the liability to pay the amount of the shares became fixed and absolute. This liability to pay calls as they should be made upon the shares is a mere incident of membership, and the fact that such payments have not been made does not affect the *status* of the member as a share-holder until a forfeiture has been declared in such manner as provided by the charter. The fact that certificates of shares have not been issued does not affect the question. Such certificate is never essential to constitute one a share-holder, being mere evidence of the ownership of shares: 1 Morawetz on Corporations, sec. 56, and cases cited.

This view of the effect of a certificate has been heretofore settled in this state: *Cornick v. Richards*, 3 Lea, 1; *State v. Butler*, 86 Tenn. 621; *Young v. South Tredegar Iron Works*, 85 Tenn. 189; 4 Am. St. Rep. 752.

It follows that Cartwright was the owner of eighty shares of the capital stock of this corporation. This stock he has never assigned or transferred to any other person. No other person claims to own his stock, or to be in any way legally or equitably entitled to have it transferred to them. The cancellation of his subscription was inoperative to cancel his shares or discharge his obligation to pay for them. Unless the charter authorizes a forfeiture of shares for non-payment of calls, there is no power in the corporation to forfeit, cancel, or annul shares once lawfully issued. The contract of share-holders is a mutual one. Without the consent of all, one cannot be released from liability. Even a board of directors cannot discharge the contract of a share-holder to pay for his shares according to his contract, or disfranchise him by a forfeiture declared without express authority of law: *Chase v. East Tenn. etc. R. R. Co.*, 5 Lea, 415; Morawetz on Corporations, sec. 809, and cases cited.

The argument that if in fact the corporation received from these new subscribers the same amount of money which Cartwright was to contribute, that in that case what was done would, in effect, be the substitution of the capital of one for

that which another was bound to contribute, is plausible, but is unsound in law, and unsustained by the facts of this case. Unsound in law because the mere fact of obtaining certain new and original capital cannot operate to empower the corporation to return capital theretofore embarked in the enterprise. These new subscribers, by their subscription, undertook to contribute additional capital, and not to substitute their capital for money to withdrawers. This was not their engagement. This is the difference between the purchasing of Cartwright's shares and the subscribing for new shares, and the distinction between the effect of buying shares already issued and subscribing for new shares. In the latter case new capital is contributed, while in the former only the legal title of shares is changed. The new subscribers, as well as the old, had a right to demand that every share-holder should be compelled to pay his shares up according to contract.

There was no more authority to cancel Cartwright's shares, and release him from his liability, after this additional capital was contributed, than there was before. The contention is not sound in fact. Mr. Grubbs seems to have supposed that he had the right to release share-holders from their obligations just as suited him or them. He seems likewise to have supposed that he was authorized to take new subscribers to take the places of such as chose to withdraw, and to furnish new capital as the necessities of the business demanded. The share-list shows several other share-holders who, after experimenting with the cracker business, withdrew, and had their money returned. So when Mr. Grubbs undertook to get new stock to take the place of old stock owned by Cartwright, he seems to have had other arrangements of the same sort to carry out; for he says that he got these new subscribers to "cover" Cartwright's stock, and that of others to whom he had made the same promises.

The fact that the authorized limit of forty thousand dollars had been reached does not seem to have been any embarrassment whatever. He says he got an amount of new subscriptions, after he agreed to place Cartwright's stock, equal to his, or greater. In this he is shown, by a careful examination of the stock-list, to have been mistaken. The total of stock subscriptions July 1, 1886, was fifty thousand dollars. The total in October, 1886, inclusive of Cartwright's, was about fifty-seven thousand dollars. Then, to cover Cartwright's eight thousand dollars, and that of others to whom he had made

same promises, there could not have been over seven thousand dollars obtained. Thus it is not even the case of money of a new subscriber having fully taken the place of an old one suffered to withdraw. That the corporation, at the time, had actually received the full sum of forty thousand dollars, and that that was the limit of its authorized capital, cannot avail Cartwright. If the shares subscribed after the limit of forty thousand dollars had been reached were valid and lawful, then the corporation was entitled to a much larger sum than forty thousand dollars. If, on the other hand, these subscriptions were void, then they were not enforceable, and money actually paid could not be lawfully held if demanded by such subscribers, creditors out of the way.

If the transaction be looked at as a purchase of these shares by the corporation, then it is equally ineffective. Whatever power a corporation may have to deal in its own shares for purposes of sale or to secure a debt, it is too clear for argument that it cannot reduce its authorized capital by purchasing its own shares for cancellation: Morawetz on Corporations, secs. 111-113.

The case of *Jackson v. Sligo*, 1 Lea, 210, does not hold a contrary doctrine, as argued by counsel. The sale of stock sustained in that case was not a sale to the corporation, but to one Sloan, a stranger.

The next defense urged is, that the corporation has violated its charter by increasing its capital stock, and that it has already issued stock certificates in excess of its lawful capital, and that therefore it is not in the power of the corporation to issue valid shares to him. The capital fixed by by-law at forty thousand dollars was, as we have already seen, exceeded by the action of Mr. Grubbs in obtaining subscriptions in excess of that limit. This was unauthorized by the share-holders or the directors. Such subscriptions for new shares, after forty thousand dollars had been taken, were null and void. In February, 1887, the share-holders amended their by-laws so as to increase their authorized capital to one hundred thousand dollars. This was intended to legalize the excess of shares already taken, and authorize a further increase. Under this amendment, new stock was taken until the whole list reached about seventy-six thousand dollars. After the assignment to Dickinson, a scheme for the reorganization of their business was conceived, and the share-holders again amended their by-laws so as to declare all stock theretofore

issued common stock, and to authorize issuance of "preferred" stock to the amount of thirty thousand dollars, this latter to have preference to the extent of six per cent in payment of dividends over the common stock. It appears that, under this scheme, some twenty-three thousand dollars of "preferred" stock has been sold, thus bringing the total of shares, excluding Cartwright's, to something over ninety-nine thousand dollars. Neither of these amendments of the by-laws was made in pursuance of the act of 1883, page 212, concerning the amendment of charters so as to allow an increase of capital stock.

The question as to whether the capital stock, having been once fixed by by-law as provided by general incorporation laws of 1875, can be increased without an amendment of the charter in the manner pointed out by the act of 1883 is a grave one, and is reserved, for the reason that in the view we have of this case it need not be decided. This question cannot affect Cartwright's liability to pay for his shares. By his subscription, as we have seen already, he became a shareholder. His shares are not affected by the subsequent issue of shares in excess of charter limit. If these shares were issued without power upon the part of the corporation to issue them, they are absolutely void, and confer no rights of membership upon those who hold them. In a contest between them and the holders of shares subscribed before the capital was all taken, they would be excluded from all participation in the management or profits of the business: *Scovill v. Thayer*, 105 U. S. 143. That the corporation has been guilty of a violation of its charter in this or any other matter is no defense to an action for calls due from a share-holder upon his shares. His remedy was against the corporation to restrain such alleged illegal action, or is against the agents personally, for any wrong and injury done him. It furnishes no reason why he shall not carry out his own contract. The usual rule by which the breach of a contract upon one side justifies its breach or abandonment by the other has little application in cases of this character: *Morawetz on Corporations*, sec. 116, and cases cited.

The question as to whether the issuance of preferred stock was valid and effective as against share-holders not assenting then or subsequently, we do not determine. Operative or inoperative, it does not affect the contract to pay for the shares he became the owner of by his contract of subscription. The

fact that he has not had notice of subsequent meetings of share-holders, or opportunity to attend or protect himself against action of the other share-holders affecting value of his stock, cannot operate to release him from his contract. Neither the directors nor the share-holders had any knowledge of the arrangement by which he supposed he was released.

In January, 1887, several months after his arrangement with Mr. Grubbs had been perfected, the latter informed the board of directors that there was a vacancy in the board, Mr. Cartwright having sold his stock. This vacancy was thereupon filled. The directors and share-holders thereafter assumed that his shares had been in fact sold to others. Grubbs, in so far as he undertook to dispose of his shares, was the agent of Cartwright in such disposition. If Cartwright was misled and deceived by the statement of Grubbs that he had sold his shares, and thereby lulled into a course of action or non-action whereby he has suffered, he can look only to his agent for indemnity. If, on the other hand, he knew the exact facts upon which Grubbs assumed authority to cancel his shares, and acted either upon the opinion of Grubbs or his own opinion, or their concurrent opinions that upon such facts the law empowered Grubbs to do what he did do, and had a legal right to release him from his contract, then both mistook the law. That a share-holder should release himself from liability to pay for his shares by proof that he was misinformed as to a fact by his own agent, or misled as to the effect of certain known facts upon his contract, or was ignorant of the law which prevented any share-holder from being released, or his subscription canceled, without the consent of the other share-holders, would be a most disastrous doctrine. The rule that a mistake of law does not relieve in equity any more than at law is well settled: *Upton v. Tribilcock*, 91 U. S. 80.

The next and last assignment of error necessary to consider is, that this action cannot be maintained by Dickinson as assignee. This assignment of error is based on the facts that subsequent to the assignment by the corporation the share-holders, other than himself, with means raised by issuance of the preferred stock heretofore mentioned, and with borrowed money, compromised the greater part of the debts of the corporation, and that the assignee has suffered them to resume business with the machinery assigned to him, they having given bond for his protection. The assets thus in their hands

are probably abundant to pay such creditors as have not yet been settled with. The only effect of this is to strip the assignee of any advantages which creditors might be supposed to have, in a suit to compel a share-holder to pay his calls, over the same action by the corporation. We have accordingly treated each question just as if it were a controversy between Cartwright and the Grubbs Cracker Company. That Dickinson is entitled to maintain this suit follows from the fact that he has not resigned his trust, and that there are creditors whose claims he must provide for. This claim is an asset in his hands, and it, together with other assets, remains in his control as trustee, and he may, and ought, reduce them to money and pay off remaining creditors and account for surplus to the assignors.

The decree of the chancellor must be affirmed, with costs.

CORPORATIONS—WHEN SUBSCRIBERS FOR STOCK BECOME STOCKHOLDERS.—In case of ordinary stock subscriptions allowed by law for the purpose of effecting the organization of a corporation, the subscribers become stockholders when all the conditions precedent prescribed by law have been complied with: Note to *Parker v. Thomas*, 81 Am. Dec. 392, 393; *Minneapolis etc. Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701, and note; *Butler University v. Scoonover*, 114 Ind. 381; 5 Am. St. Rep. 627; and it is not necessary that a certificate of stock should have been issued to the stockholder: *Butler University v. Scoonover*, 114 Ind. 381; 5 Am. St. Rep. 627; as stock certificates are merely an affirmation on the part of the corporation of the ownership of the special amount of stock by the person named in the certificate: *Appeal of Kiesterbock*, 127 Pa. St. 601; 14 Am. St. Rep. 868.

WITHDRAWAL AND RELEASE OF STOCKHOLDERS, AND FORFEITURE OF STOCK: See note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 821-823, note to *Parker v. Thomas*, 81 Am. Dec. 399-401.

FRAUD AND MISTAKE AS AFFECTING A STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS: Note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 824-826.

SNODDY v. BANK.

[88 TENNESSEE, 572.]

NOTE GIVEN BY MAKER IN SETTLEMENT OF LOSS SUSTAINED WHILE DEALING IN FUTURES is void in the hands of the payee, and that though such payee pretended to be or was a mere agent in the transaction, where he knew of and participated in its illegality.

CONTRACT TO DEAL IN FUTURES IN GAMING CONTRACT, AND VOID by express statute, which makes it a crime, and punishes it as such.

NOTE GIVEN IN CONSIDERATION OF GAMING CONTRACT IS VOID IN HANDS OF INNOCENT HOLDER, by indorsement for value before due, and without notice of the illegality of the consideration. The statute need not expressly declare such a note void, if it does so by necessary implication,

and a statute does by necessary implication make such note void when it makes the contract under which it is executed void and criminal. But the Tennessee statute goes further, and makes the transfer of such a note to a party ignorant of its illegality a criminal offense.

ACTION by the American National Bank to recover of Snoddy upon a note given by him to Williams & Co., and by them indorsed to it for value before due, and in due course of trade. The facts sufficiently appear from the opinion.

Dan Williams, for Snoddy.

Will T. Hale and John M. Gaut, for the Bank.

SNODGRASS, J. The only question in this case is, whether an innocent holder of a note founded on a gaming consideration can recover of the maker.

The note sued on was void in the hands of the payee. It was given in settlement of loss sustained by plaintiff in error while dealing in futures with Williams & Co. There was no intent to take or deliver grain pretended to be purchased on the one hand or sold on the other. The contract to do so was therefore gaming, and void by express statute: Act 1888, p. 331; *McGrew v. City Produce Exch.*, 85 Tenn. 572; 4 Am. St. Rep 771.

Nor does it matter that Williams & Co. pretended to be or were mere agents in the transaction. They knew of and participated in its illegality, and could maintain no action on the note given them for the loss sustained by their alleged principal: *Beadles v. Ownby*, 16 Lea, 424.

But they transferred the note taken by them in settlement of the loss sustained by plaintiff in error to the American National Bank before due for value, and the bank had no notice of the illegality of the consideration. It is therefore insisted the bank may recover as an innocent holder, and the circuit judge so held.

Our statute makes all wagering contracts void to the extent of the wagering consideration, and provides that no money or property won by any species or mode of gaming shall be recovered by action, and that any money or property so paid or delivered may be recovered back by the payer, his wife, children, next of kin, or creditors: Code secs. 2438 et seq.

The particular species of gaming now being considered is made a misdemeanor, and punished as such, the limitation as to least punishment being more severe than that of ordinary gaming: Act 1883, sec. 3.

Thus it appears that such a contract is not only against public morals and public policy and public statute, — *malum in se* and *malum prohibitum*, — and that it is declared void, but it is also made a crime, and punished as such. The general rule that as between an innocent holder and the maker the consideration cannot be inquired into is subject to the exception that it may be done if the consideration was a gaming or usurious one: 3 Kent's Com., 9th ed., 99.

By the great weight of authority, notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands: 2 Am. & Eng. Ency. of Law, 368, and notes.

Perhaps there are no exceptions when, in addition, the transaction is also criminal.

It is insisted, however, that the statutes referred to do not, in express terms, declare that negotiable notes so executed are void in the hands of innocent holders, and that unless the statute so declares they will be held good; and for this proposition Chitty on Bills, 104, 105, Daniel on Negotiable Instruments, sections 197, 198, and several cases are cited.

But these authorities (and to the same effect is Story on Promissory Notes, sec. 192, from which Mr. Daniel copies the greater part of sections cited) show that the statute need not expressly declare such notes void; if it does so by necessary implication, it is sufficient.

We hold that the statutes referred to do by necessary implication makes such notes void in making the contract under which they are executed void and criminal.

But the statute goes further. It affirmatively shows that such negotiable notes are not to be used, and makes the transfer of such a note to a party ignorant of its illegality a criminal offense: Code, secs. 2444, 5708.

It results, therefore, that the bank cannot maintain an action on the note in controversy, and the judgment of the circuit judge must be reversed, and judgment entered here in favor of plaintiff in error.

The costs of both courts will be paid by the bank.

CONTRACTS — DEALING IN FUTURES. — Contracts to deal in futures, or margins, are illegal and void, and promissory notes growing out of such transactions are invalid between the parties, though valid in the hands of an innocent holder for value, who received the notes in due course of trade: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; and particularly note 33, 34.

CARSON v. RAILWAY COMPANY.

[88 TENNESSEE, 644.]

EXEMPTION LAWS HAVE NO EXTRATERRITORIAL EFFECT, but are restricted in their operation to the states in which they are enacted.

RESIDENT OF TENNESSEE SUED IN ANOTHER STATE CANNOT OBTAIN BENEFIT OF EXEMPTION secured to him by the Tennessee statutes, nor can his garnished debtor, in such case, obtain it for him, and he is under no obligation to endeavor to do so.

DEBT. The opinion states the case.

Watson and Hirsch, for Carson.

Poston and Poston, for the Railway Company.

CALDWELL, J. This is an action of debt tried below and here on an "agreed state of facts."

The plaintiff, Sam Carson, was in the service of the defendant, the Memphis and Charleston Railroad Company, as brakeman on one of its trains running from Memphis to Chattanooga and back again, through Mississippi and Alabama. He was a citizen of Tennessee, made his contract of employment here, and usually received his wages at Memphis, though no place of payment was named in the contract.

While so employed, the plaintiff, in the month of May, 1888, earned \$20.45, which, by the custom of the company, became due and payable on June 10th, following.

On May 28th, Prout, a citizen of Alabama, sued out an original attachment in that state against Carson, on the ground of non-residence, to collect a debt of twenty-one dollars contracted there; and on the same day a writ of garnishment issued on the attachment against the Memphis and Charleston Railroad Company to reach a sufficiency of Carson's wages to pay his debt to Prout.

Proper publication was made for Carson, and by that means or some other he had actual notice of the pendency of the attachment and garnishment proceedings, but he failed to make defense. The garnishment process was served on the company's agent at Tusculumbia, and on June 11th, one day after Carson's wages became due and payable, the company answered that it owed him "\$20.45 for wages due him as brakeman."

Trial was duly had, and judgment rendered against the garnishee for the \$20.45. This judgment the company paid.

Thereafter, on June 28, 1888, Carson brought the present

suit before a justice of the peace at Memphis to recover the same wages from the railroad company.

The fact of the proceedings in Alabama and the payment of the judgment there were interposed as a defense to the action. The justice of the peace, and after him the judge of the circuit court, adjudged the defense a good one, and rendered judgment for the defendant.

Carson has appealed in error.

It is agreed that the attachment and garnishment proceedings were in strict conformity to the laws of Alabama. From this concession it follows that the garnishee was completely discharged from all liability by payment of the garnishment judgment, unless there be something in the question of exemption to take the case out of the usual rule, and prevent that result.

It is earnestly argued by Carson's counsel that this is an exceptional case, made so by the fact that under the law of this state (Milliken and Ventrees's Ann. Code, sec. 2931) his wages to the extent of thirty dollars were exempt from seizure by garnishment or otherwise. The position, briefly stated, is, that it was the duty of the garnishee to claim the exemption for Carson, and thereby prevent judgment against it on the garnishment process, and that having failed to do this, the company's indebtedness to him remains unchanged and unsatisfied.

To our minds, this position seems altogether untenable, for more reasons than one.

1. There was no peculiarity about this indebtedness to Carson,—no inherent quality or superadded responsibility to distinguish it from any other debt,—so far as the company was concerned. It owed this debt as it owed any other debt. It had assumed no other obligation than that of payment of a particular sum at a specified time.

The contention of Carson would make the obligation greatly more burdensome by throwing upon the company the additional responsibility and expense of knowing, at its peril, that there was an exemption law in his favor, and of claiming the benefit of it for him. Such a requirement would be unjust and unreasonable.

In *Davenport v. Swan*, 9 Humph. 186, the garnishee stated, in his answer, that a horse of the debtor in his possession was exempt from execution, whereupon he was discharged, because his answer, which was conclusive, did not contain a

sufficient admission to charge him. That case does not stand in the way of the views just expressed. There the garnishee volunteered to set up the fact of exemption. He was not required to do it; nor was it decided or intimated that it was his duty to do so, or that in case of failure to do so, he would have been liable to the garnishment debtor for the value of the horse. No such question was before the court.

The question of the right or duty of a garnishee in this state to plead the exemption law of another state in favor of its creditor, the garnishment debtor, who resided in the other state, was expressly reserved by this court in the case of *Holland v. Mobile etc. R. R. Co.*, 16 Lea, 418, 419.

2. Had the railroad company made the claim of exemption ever so formally for Carson, it would have availed him nothing. Exemption laws have no extraterritorial effect. Their operation is restricted to the states in which they are enacted: *Freeman on Executions*, sec. 209; *Thompson on Homesteads and Exemptions*, sec. 20.

Carson was a citizen of Tennessee, and in the courts of this state would have been entitled to the exemption had he claimed it; but the suit was in Alabama, where even he could not have made the claim successfully. Then, of course, the garnishee could not have done so for him, and ought not to suffer for failing to make the effort.

Non-residents of this state cannot avail themselves of the benefit of our exemption laws, either as to personalty: *Hawkins v. Pearce*, 11 Humph. 45; *Lisenbee v. Holt*, 1 Sneed, 50; or as to homestead: *Prater v. Prater*, 87 Tenn. 83; 10 Am. St. Rep. 628; *Emmett v. Emmett*, 14 Lea, 370.

Learned counsel for Carson relies on certain authorities which are yet to be noticed.

Mr. Smyth, in his work on homestead and exemptions, section 562, says: "A garnishee who pays over money which constitutes a part of the personalty exemption of the debtor does so at his own risk. He will be liable to the debtor (his creditor) for the full amount he has paid. A person who has been brought into court as a garnishee may answer that the property of the debtor in his hands, or his indebtedness to such debtor, is exempt, by law, from seizure on attachment or execution; and he is bound to bring the fact to the notice of the court; otherwise the judgment against such garnishee, and the satisfaction thereof, will not bar an action against him by the attaching debtor."

For these propositions the author cites *Watkins v. Cason*, 48 Ga. 444, and *Pierce v. Chicago etc. R. R. Co.*, 36 Wis. 288. We have not had access to the former of these cases, but the latter we find to be an authority for the text, and very similar to the one at bar; the difference being that the creditor of the garnishee in that case had no notice of the suit plead in bar. That case has attracted wide attention, and received very unfavorable comment from courts of last resort, and text-writers. It cites no precedent to support it, and, so far as we know, has not itself been followed by any subsequent case. In note 2 to section 209 of his work on executions, Mr. Freeman says it is "utterly indefensible." Mr. Thompson likewise assails it as unsound, and assigns his reasons at some length. in section 866 of his work on homestead and exemptions.

The cases of *Burlington etc. R. R. Co. v. Thompson*, 16 Am. & Eng. R. R. Cas. 460, *Mooney v. Union Pacific R'y Co.*, 9 Am. & Eng. R. R. Cas., and *Eichelburger v. Pittsburg etc. R. R. Co.*, 9 Am. & Eng. R. R. Cas. 158, decided, respectively, by the courts of last resort in Kansas, Iowa, and Ohio, are in conflict with the Wisconsin case (the last one expressly denying its soundness), and in harmony with our holding herein.

Let the judgment be affirmed.

EXEMPTION LAWS OF A STATE HAVE NO EXTRATERRITORIAL EFFECT, as to be available to non-residents: *Prater v. Prater*, 87 Tenn. 78; 10 Am. & Rep. 623, and note; *Stanton v. Hückcock*, 64 Mich. 316; 8 Am. St. Rep. 821, and note.

GARNISHMENT. — Ordinarily, a garnishee, if he has in his possession any property of the defendant not subject to execution, ought to assert the fact of such exemption, and thereby prevent the application of the property to satisfying the execution: Note to *Hanna v. Loring*, 12 Am. Dec. 341, 344; *Clark v. Aschell*, 31 Vt. 512; 76 Am. Dec. 181.

POWELL v. CONSTRUCTION COMPANY.

[88 TENNESSEE, 692.]

INDEPENDENT CONTRACTOR IS ONE WHO, EXERCISING INDEPENDENT EMPLOYMENT, CONTRACTS TO DO A PIECE OF WORK ACCORDING TO HIS OWN METHODS, AND WITHOUT BEING SUBJECT TO THE CONTROL OF HIS EMPLOYER, EXCEPT AS TO THE RESULT OF HIS WORK.

EMPLOYER OF INDEPENDENT CONTRACTOR NOT LIABLE FOR LATTER'S NEGLIGENCE WHEN. — One who employs a fit and proper person as an independent contractor to do work not in itself unlawful, or a nuisance, or necessarily attended with danger to others, is not responsible for such contractor's negligence, nor for that of his subcontractor or servants.

STIPULATION THAT WORK SHALL BE DONE TO SATISFACTION OF EMPLOYER'S ENGINEER, EFFECT OF. — The fact that a general railway contractor sublets a part of the work embraced in his own contract, and stipulates that the work is to be done in a thorough and workman-like manner, to the satisfaction of his chief engineer, is not evidence of such an assumption of a right to control, as to the details or methods of doing the work, as will make him responsible for the wrongs of such subcontractor or of his servants. Nor does the fact that the contract provides that the track is to be laid as far as such engineer shall order take it out of the rules applicable to independent contractors.

INDEPENDENT CONTRACTOR LIABLE FOR ACTS OF SERVANT LENT TO HIM WHEN. — The fact that one is the general servant of one employer does not, as matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. If he was performing a special service for an independent contractor, he will be, as to that particular service, the servant of him for whom such service was performed, although he may be the general servant of another.

PAROL EVIDENCE ADMISSIBLE TO SHOW RELATION OF PARTIES DIFFERENT FROM THAT STATED IN CONTRACT. — Although upon the face of a written contract the relation between the parties thereto seems to be that of employer and independent contractor, it is competent to show that the parties, as matter of fact, by their conduct, put a different construction upon it, and that in fact the relation was that of master and servant.

ACTION for personal injuries. The opinion states the case.

M. B. Trezevant, and Turley and Wright, for Powell.

J. H. Watson, for the Construction Company.

LURTON, J. The defendant is a corporation engaged in the business of doing railway construction under contract. It had a contract for the construction of the Tennessee Midland road from Memphis to Jackson. It sublet a portion of the track-laying to a firm of contractors, known in the record as Meredith and Horton. The plaintiff, while the general servant of defendant, and while acting as a brakeman, was injured in making a coupling, and sustained the loss of an arm. The negligence alleged was that of Meredith, one of the subcontractors.

tors; and the case turns upon the question of the liability of defendant for his negligence. The contract between Meredith and Horton and defendant was in the following words and figures:—

VIRGINIA CONSTRUCTION COMPANY.

ARTICLES OF AGREEMENT.

[Signed in triplicate.]

Made and concluded this fifteenth day of November, 1887, by and between J. P. Meredith and J. R. Horton, under the firm name of Meredith and Horton, parties of the first part, and the Virginia Construction Company, party of the second part, witnesseth that the party of the first part does hereby agree to lay the track of the Tennessee Midland Railway Company east from a connection with the Memphis and Charleston railroad tracks, at or near McGhee's Junction, as far as the chief engineer of the party of the second part may determine and order, for the sum of four hundred and seventy-five dollars (\$475) per mile, including all handling and re-handling of materials, to wit:—

For unloading rails, ties, and fastenings on arrival,	
per mile	\$15 00
Reloading and unloading same during progress of	
work	60 00
Distribution of ties	125 00
Laying and surfacing track	275 00

Total, laying and surfacing, per mile, complete,
including all handling of materials of every
kind \$475 00

It is understood that the party of the second part will furnish push-cars, locomotive, flats, and engineer, fireman, and one brakeman; that there shall be two thousand eight hundred and sixteen (2,816) ties to the mile, full spiked; that the fish-plates shall have four (4) bolts to the joint, carefully adjusted; and that the track shall be surfaced with the best material found contiguous to the road-bed; but material for surfacing is not to be taken from the embankments, but procured outside of the slopes, and where necessary, said material shall be hauled. In crossing the river bottoms, or at other places where surfacing material is difficult to get, such extra allowances may be made as the chief engineer deems equitable.

The parties of the first part hereby agree to put in the cattle-guards upon that part of the road where the track is laid

by them, as per plan furnished, including excavation of pit and all materials for guard and fencing, for \$45 each. The lumber used in cattle-guards to be of heart white oak, heart post oak, or heart yellow pine, free from all defects calculated to impair strength; the whole to be done in a thorough and workman-like manner, to the satisfaction of the chief engineer of the party of the second part.

Approved, as being in accordance with proposal of parties of the first part. **R. H. TEMPLE, Chief Engineer.**

Witness the following signatures:

MEREDITH AND HORTON.

VIRGINIA CONSTRUCTION COMPANY,

By —, V. P. and G. M.

Witness: **T. T. TALLEY.**

C. L. POWERS, JR.

No question is made as to the competency of the several members of the crew of the train for the posts to which they were assigned by defendants, in whose general service they were. The negligence alleged is, that Mr. Meredith temporarily displaced the engineer on one of the construction engines, and ordered his fireman to act as engineer, while plaintiff, a brakeman on same train, did some necessary coupling. By the negligent and unskillful conduct of this acting engineer in the management of the engine while making this coupling, plaintiff's arm was crushed. It is charged that the unfitness of this fireman to manage an engine was known to Meredith, and unknown to plaintiff. Plaintiff's suit was originally against both the Tennessee Midland road and the Virginia Construction Company. There has been two trials of the cause. The first resulted in a verdict and judgment in favor of plaintiff, but against the construction company alone. This verdict as against defendant was set aside, and a new trial granted. Upon the second trial, there was a verdict and judgment for defendant. Both records are before us, but no error is assigned upon the failure of the circuit judge to set aside the verdict in the first trial, in favor of the railway company.

Was Meredith the agent or servant of the Virginia Construction Company in the management of this construction train? If he was, defendant is responsible for his negligence. If, however, he was not the agent or servant of defendant, but an independent contractor with reference to the work he had contracted to do, and in the management and control of this

train, and the defendant had no right to control his conduct in the particular matter complained of, then plaintiff's remedy would be against Meredith and Horton, the subcontractors, and not against defendant.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer, except as to the result of his work. The employer of such a contractor, if he be a fit and proper person, and the work be not in itself unlawful, or a nuisance in itself, or necessarily attended with danger to others, will not be responsible for his negligence, or that of his subcontractors or his servants. Mr. Thompson, in his work upon negligence, says that "in every case the decisive question is, Had the defendant the right to control, in the given particular, the conduct of the person doing the wrong?" Thompson on Negligence, 909.

The fact that the general contractor sublets a part of the work embraced in his own contract, and stipulates, as in the contract under consideration, "that the work is to be done in a thorough and workman-like manner, to the satisfaction of its chief engineer," will not be such an assumption of a right to control as to the details or methods of doing the work as will make him responsible for wrong of such subcontractor or his servants. Such a provision is nothing more than is usual and necessary in order to enable the employer to see that the work contracted for is carried out, and neither implies nor authorizes any such control of the details as would make the contractor his servant: Thompson on Negligence, 913; *Pack v. New York*, 8 N. Y. 222; *Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. Rep. 642; *Clark v. Hannibal etc. R. R. Co.*, 36 Mo. 202.

The fact that this contract provided that the track was to be laid as far as it should be ordered by the chief engineer of defendant does not take it out of the rules applicable to independent contractors: *Hughes v. Railroad*, 15 Am. & Eng. R. R. Cas. 100.

There can be no serious doubt that, upon the face of this contract, Meredith and Horton were independent contractors, within the rule we have stated, in so far as their engagement applies to the surfacing and laying of track. The difficulty presented arises upon that provision by which the defendant contracted to furnish them with "push-cars, locomotive, flat and engineer, fireman, and one brakeman."

Now, if this be construed as an engagement whereby the

defendant agreed to do part of the work,—such part as required the use and services of a train,—and that it was to do this part with its own cars, engine, and train servants, so that this part of the work was to be done by it independently of Meredith and Horton, or in conjunction and co-operation with them, then the defendant would be in the control of this train, and its crew would be not only their general servants, but their special servants, engaged in the special work of defendants. In such case, if Meredith and Horton were permitted by defendants to manage and control this train exclusively, or in co-operation with it, they would be their agents and servants with respect to such control and management, although as to the other work to be done by them they would be independent contractors.

But upon looking to this contract in all its parts, we do not think that it was contemplated that any part of the work involved in it should be done or carried on by defendant, either independently or in co-operation with the subcontractors. The contract requires Meredith and Horton to unload the rails, ties, and fastenings. Now, this clearly contemplated the delivery of these materials to them, and presumably at the point where the track to be laid made connection with some completed railway over which this material had been shipped. Having unloaded the material at the place of arrival from the cars of the carrier, the contract then plainly requires,—1. The reloading, upon their own train, for distribution along the line of the progressing work; 2. The unloading at points convenient for use or redistribution; 3. The distribution of ties in advance of track-laying; 4. The laying of the track, and its surfacing.

It is manifest that this work would require one or more construction trains, with crews necessary for operation.

Now, in view of the situation, and the work to be done, the meaning of the contract seems to be this: That inasmuch as in the transportation of materials from point of beginning to points along the advancing way, and in the distribution thereof, it would be necessary, in order to do their work, that the contractors for track-laying should have the use of push and flat cars, and an engine, and the services of an engineer, fireman, and brakeman familiar with management of trains; and, inasmuch as the defendant owned and had upon the ground such engine and cars, and had in its service competent men to operate such a construction train, it was therefore agreed that defendant should furnish such construction train

and crew to Meredith and Horton, to be under their control, to aid them in doing their work, and that defendant should, on this account, pay them as much less for the work they were to do as such appliances and servants would cost them if they had to find the engine and cars and pay the men themselves. Obvious economic reasons would require that the train distributing materials should be under the control of the men who had contracted to lay the track.

But it is urged very earnestly that inasmuch as this contract implies that the servants operating this train were to be selected and paid by the defendant, therefore they continued to be the servants of the defendant, and that no power to control them or this train could be vested by contract in another, save by way of delegation, and that, as matter of law, the person exercising control would be the agent of the general master.

This argument seems very plausible, and furnishes the real point of difficulty in the case. The question which is thereby raised is, for the most part, a new one, and the decisions, few in number, show a diversity of judicial opinion. After careful consideration, we think the weight of opinion, as well as of reason, is, that the fact that one is the general servant of one employer will not, as matter of law, prevent him from becoming the particular servant of another. The question as to who originally employed the servant, or who pays him, is not always a conclusive test as to who was his master in and about a particular work upon which he was engaged.

The better test would seem to be, Was he, in regard to the particular matter in which he was employed, doing the work of a general master? or was he engaged in doing the work of another, over whom the general master had no control? If he was performing a special service for another, who, with reference to the details of such work, was an independent contractor, then the servant will, as to that particular service, be the servant of the one for whom such service was performed, although he may be the general servant of another.

The cases of *New Orleans etc. R. R. Co. v. Norwood*, 62 Miss. 565, 52 Am. Rep. 191, and of *Burton v. Galveston etc. R. R. Co.*, 61 Tex. 526, have been pressed upon us by counsel. They are not in harmony with the view we have reached, in so far as they seem to rest the question upon the power of employment and discharge, and the duty of paying. These tests would prevent the general servant of one from becoming the

particular servant of another, under any circumstances. The general master would always stand responsible for his negligence, although engaged in doing the work and under the control of another. We think the better rule, and the better supported rule, to be that announced by Chief Justice Cockburn in *Rourke v. Whiteman Colliery Company*, L. R. 2 C. P. D. 208.

In that case, the learned judge said: "When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he was lent, although he remains the general servant of the person who lent him." The case in which this principle was applied was this: The colliery company contracted with one Whittle to sink a shaft and remove the soil. The services of an engine and engineer were necessary to the accomplishment of this work. The colliery company, having such an engine and an engine-man in its service, contracted to let Whittle have this engine and engine-man to aid him in doing his work, and to be under his control, and that it should pay Whittle as much less for his job as he would have had to pay if he had had to find the engine and pay the engineer himself. By the negligence of this engine-man, the general servant of the colliery company, the plaintiff, Rourke, sustained an injury, for which he sued the colliery company. It was held that the engine-man, being under the control of Whittle, an independent contractor, and being engaged in doing his work, was, while thus engaged, the particular servant of Whittle; though he had been selected and paid by the colliery company, and was its general servant, yet the latter were not liable for his negligence while thus engaged.

The same principle was applied in the following cases, the facts of which brought them within the same general principles as are decisive of the case now under consideration: *Miller v. Railroad*, 38 Am. & Eng. R. R. Cas. 234; *Cunningham v. International R. R. Co.*, 51 Tex. 503; 32 Am. Rep. 632; *Central Railroad etc. Co. v. Grant*, 46 Ga. 417; *Vary v. B., C. R., & M. R'y Co.*, 42 Iowa, 246; *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 (S. C., though with erroneous head-note, 45 Am. Rep. 54).

The construction of this contract by the learned circuit judge was in accord with the view we have taken of it. It was, of course, competent for the plaintiff to show that, as

matter of fact, the parties had put a different construction upon it by their conduct, and that defendant had in fact exercised a supervision and control over the work in its details inconsistent with the presumed character of Meredith and Horton as independent contractors, thus making a liability outside of the contract. It was also competent to show that, with reference to the control of the construction train, Mr. Meredith was in fact the agent and servant of defendant, either by express authority, or by implication arising from the conduct of the parties and the uses to which the train was put. All proof which tended to show any of these things was admitted, and the jury properly and clearly instructed as to its legal effect. There is an abundance of evidence to support, under our rule, the finding of the jury for defendant, and there was no error in the charge. There was no error in setting aside the first verdict in this case, and none in refusing to set aside the last.

Judgment affirmed.

MASTER AND SERVANT — INDEPENDENT CONTRACTOR, WHO IS. — An independent contractor is one who is free to use his own skill and judgment, and to employ and direct his own servants, being answerable to his employer merely for the general result of his work: *Finb v. Missouri P. Co.*, 82 Mo. 276; 52 Am. Rep. 376; *Clark v. Fry*, 8 Ohio St. 358; 72 Am. Dec. 590; *Detroit City v. Corey*, 9 Mich. 165; 80 Am. Dec. 78.

MASTER AND SERVANT — INDEPENDENT CONTRACTOR — NEGLIGENCE. — Employer's liability for the acts and omissions of the contractor: *Detroit City v. Corey*, 9 Mich. 165; 80 Am. Dec. 78, and cases cited in note; extended note to *Stone v. Cheshire etc. R. R. Corp.*, 51 Am. Dec. 200-206; *Bailey v. Troy etc. R. R. Co.*, 57 Vt. 252; 52 Am. Rep. 129; *Carter v. Berlin Mills*, 58 N. H. 52; 42 Am. Rep. 572, and foot-note. The doctrine of *respondent superior* does not apply to an independent contractor: *Barton v. McDonald*, 81 Cal. 263; *Rome etc. R. R. Co. v. Chastan*, 88 Ala. 501.

STREET RAILWAY COMPANY v. DOYLE.

[88 TENNESSEE, 747.]

STREETS — ADDITIONAL SERVITUDE. — A RAILWAY CONSTRUCTED BY AUTHORITY on a public street or road whose cars, used for carrying passengers only, are propelled by a dummy steam-engine is an additional burden or servitude on such street or highway to that contemplated in the original dedication of the land to public use, and the owner of the fee in the street or highway is entitled to compensation as for a taking of his property for public use.

ACTION to recover damages. The opinion states the case.

Turley and Wright, and Myers and Sneed, for the Street Railway Company.

F. P. Edmondson and J. P. Houston, for Doyle.

CALDWELL, J. Action by Doyle, an abutting lot-owner, to recover damages from the East End Street Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below, the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city, to a point five miles into the country, in accordance with its contract with the city and county, road [its cars?] being propelled by a steam-motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication."

The court refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in *Smith v. Street R. R. Co.*, 87 Tenn. 633, namely, whether a railway whose cars are propelled by "a dummy steam-engine," and used for passengers only, is a burden or servitude on the public street or highway in addition to that contemplated in the original dedication of the land to public use. The reservation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not therefore in an attitude to be affected by a decision of the question. For reasons stated in that case, and in the *Bingham* case, to be hereafter cited, an abutting land-owner whose line is the side and not the center

of the public highway is not entitled to compensation for the imposition of an additional burden on the ultimate fee. Not owning the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate out of which the public easement was originally carved, and not for the abutting owner, whose title papers take him only to the side of the highway, as was true in the Bingham and Smith cases.

In the present case, the plaintiff's line is in the center of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume absolute possession and dominion of it to the center of the highway whenever the original use for which the highway was set apart shall be finally abandoned.

The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently, anything which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property, for which he may demand and recover just compensation.

So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street-railway operated with horses is not, an additional servitude on the ultimate fee in the public street or highway, the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use: *Railroad Co. v. Bingham*, 87 Tenn. 522; *Smith v. Street Railroad Co.*, 87 Tenn. 638, and authorities cited.

The distinction between the use by the commercial railway and that by the horse-railway is so wide and plain that it needs no further comment or illustration.

Confessedly, the railway involved in this case is on the line between the two, — the equivalent of neither, but partaking largely of the nature of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise, and vibration, though in a less degree; and like the horse-car line, it transports passengers only,

stopping at short intervals upon the highway, to take them on and let them off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots farther apart.

The size, weight, and speed of appellant's trains — consisting usually of a small "boxed" engine and two coaches — are much less than those of the commercial railway trains; but at the same time, its trains are much larger, heavier, and more rapid in transit than the ordinary horse-car. Alike, the commercial railway and that operated by the appellant are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway; alike, they endanger the lives and property of individuals, for whom, in the aggregate, the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree, and not in the kind, of interruption and peril.

From the very nature of the case it is perfectly manifest, to our minds, that the presence of appellant's track and trains is entirely inconsistent with and a perpetual embarrassment to the ordinary use of the public highway.

It is utterly impossible to operate such a railway with such trains without greatly obstructing and rendering more dangerous other business and travel usually seen and always allowable on a public highway.

To the extent of this obstruction, and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway.

This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the state and contract with the city and county authorize the proper construction and use of this railway, but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such were their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the constitution forbids the taking of private

property for public use without just compensation: Constitution, art. 1., sec. 21.

The instruction requested was properly refused.

Counsel for appellant have called our attention to the case of *Newell v. Minnesota etc. Ry Co.*, 85 Minn. 112, 59 Am. Rep. 808, which we find to be an authority for the proposition requested, and in conflict with the conclusion reached in this opinion. Not agreeing to the reasoning of that case, and the decision of a sister state being at most only persuasive authority, we prefer not to follow it.

We have carefully considered the several other assignments of error. None of them are well taken.

Let the judgment be affirmed.

RAILWAY COMPANIES — STREETS. — While a street horse-railway may be constructed and operated in a city street without compensation to the abutting property owners, a municipality cannot authorize the construction and operation upon and over its streets of a steam-railway without compensation to the abutting lot-owners: Note to *Theobald v. Louisville etc. Ry Co.*, 14 Am. St. Rep. 539.

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4. **RIGHT OF AGENT TO APPOINT SUBAGENT.** — An agent may appoint a sub-agent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, and which are purely executive or ministerial, and the principal is bound by the acts of such agent. Therefore, if the duty of agent is to point out land which the principal desires to sell, and a subagent, selected by the agent, directs a third person to point out lands which the subagent knows are not the lands of the principal, the latter is bound by the wrongful act of the subagent, and must restore the consideration paid for the conveyance of the land, when such consideration was paid under the belief that the lands conveyed were the same as those pointed out. *McKinnon v. Vollmar*, 178.

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3. VERIFICATION OF COMPLAINT BY AN ATTORNEY IS SUFFICIENT to sustain garnishment proceedings, if it appears therefrom that the attorney has read the complaint and knows the contents thereof, and verily believes the same to be true, that the sources of his information which are the grounds of his belief were derived from statements of the plaintiff's account and letters in reference thereto, received by him from the plaintiff, and the reason why the complaint is not verified by one of the plaintiffs is, that none of them reside in the same county with the attorney. *Id.*

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BAIL.

1. **ALL PERSONS HAVE CONSTITUTIONAL RIGHT TO BAIL BY SUFFICIENT SURETIES**, except for capital offenses, when the proof is evident or the presumption great. *Ex parte Goans*, 571.
2. **IDIOTISM FOR CAPITAL OFFENSE FURNISHES STRONG PRESUMPTION OF GUILT**, and this presumption must be applied in all cases on application for bail, and there must be other facts and circumstances which overcome this presumption before the prisoner can be bailed. One or even two mistrials will not furnish the accused the absolute right to give bail. *Id.*
3. **PRISONER MAY BE ADMITTED TO BAIL WHEN.**—Where there has been one mistrial of a prisoner on a capital charge, under circumstances favorable to the prosecution, and his conduct prior and subsequent to the trial shows to the satisfaction of the court that he has not and never has had any thought of evading trial, and the evidence taken on such trial is conflicting as to his guilt, he may be admitted to bail upon furnishing sufficient security. *Id.*

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BANKS AND BANKING.

1. **DIRECTORS OF A BANK MUST EXERCISE ORDINARY CARE AND DILIGENCE**, and are answerable for losses resulting from mismanagement of its business affairs. They must show reasonable capacity for the position they accept, and use in it their best discretion and industry, and a scrupulous conscientiousness in every matter, and obey accurately the requisitions of the charter and of the general law. *Marshall v. Farmers' etc. Bank*, 84.
2. **IGNORANCE ON THE PART OF DIRECTORS OF A BANK** of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited. *Id.*
3. **DIRECTORS OF A BANK OWE A DUTY TO ITS DEPOSITORS**, and in the scrutiny of possible breaches of this duty the rigid rules which govern trustees have been applied. To exculpate a director, it is not sufficient that no actual dishonest action be shown, or that he cannot be proved to have been influenced by interested motives. *Id.*

4. A DIRECTOR OF A BANK UNDERTAKES THAT HE POSSESSES AT LEAST ORDINARY KNOWLEDGE AND SKILL, and that he will bring them to bear in the discharge of his duties. If, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents or co-directors, which ordinary care on his part would have prevented, he is personally liable for the loss resulting. *Id.*
5. BANK DIRECTORS ARE LIABLE TO THE DEPOSITORS FOR LOSSES resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, or from not being properly protested, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrong-doings will not exonerate him, because he could not be without such knowledge, except from his own negligence. *Id.*
6. DEPOSIT AS AGENT. — Where money is deposited in a bank by a person as agent, with nothing upon the face of the deposit account to show for whom he is agent, the money, as between the bank and the depositor, is the property of the latter. *Patterson v. Marine Nat. Bank*, 778.
7. DEPOSIT — ESTOPPEL. — A bank which has received money from a depositor, credited him therewith upon its books, and thereby entered into an implied contract to honor his check, is estopped from alleging that the money deposited belonged to some one else. *Id.*
8. RIGHTS OF DEPOSITOR — BURDEN OF PROOF. — Where money is deposited in bank by a person as agent, without anything on the face of the deposit account to show for whom he is agent, if the bank refuses to honor his check drawn against such fund, and pays the money to a third person, it does so at its peril, and must assume the burden of proof to show, not only that the money did not belong to the depositor, but also that it did belong to the party to whom the bank paid it. *Id.*
9. DAMAGES FOR REFUSAL TO HONOR CHECK. — The refusal of a bank to honor a depositor's check, without legal excuse, entitles him to recover substantial damages, without proof of pecuniary loss. *Id.*
10. FORGED CHECK, LIABILITY OF BANK FOR NEGLIGENTLY CASHING. — A bank which negligently cashes a forged check purporting to be drawn upon another bank, and upon its indorsement of the check receives payment from the drawee bank, is liable to the latter bank for the amount received, upon subsequent discovery that the check was forged. *People's Bank v. Franklin Bank*, 884.
11. NEGLIGENCE IN BANK CASHING FORGED CHECK, WHAT IS EVIDENCE OF. — Where a bank that cashes a forged check is unable to give the name of the person who presented such check, or of the person to whom it was paid, or to state positively that it required identification of such party, this is sufficient evidence of its negligence to render it liable to the drawee bank to which it indorsed it. And the drawee bank will not be precluded from recovery, because, relying upon the indorsement of the other bank, it paid the check, without investigation as to its genuineness. *Id.*
12. POSSESSION OF BANK CHECK BY DRAWER PRIMA FACIE EVIDENCE OF PAYMENT. — Possession by the bank upon which it was drawn of a

check payable to a particular person or order raises a presumption that it was paid to the payee therein named. But such presumption is rebutted by the positive and uncontradicted testimony of the payee, that he in fact never did collect the check, or authorize any one to collect it for him. *Pickle v. Muse*, 900.

13. **BANK CHECK RETURNED TO DRAWER VOUCHER OF PAYMENT WHEN.** — A bank check returned to the drawer after being paid and debited to his account with the indorsement of the payee, is a voucher of such payment in favor of the drawer against the payee; but without such indorsement it is not evidence, as between drawer and payee, of such payment. *Id.*
14. **ACCEPTANCE OF BANK CHECK NECESSARY TO MAINTAIN SUIT AGAINST BANK.** — The holder of a bank check cannot sue the bank for refusing payment thereof, in the absence of proof that the bank accepted the check, or did some other act equivalent to and implying acceptance. *Id.*
15. **ACCEPTANCE OF BANK CHECK, WHAT IS SUFFICIENT EVIDENCE OF.** — The acceptance of a bank check and assent to the payment thereof may be inferred from proof of the fact that the bank received and retained it when presented at its counter, and subsequently charged the check to the account of the drawer, and settled with him, deducting the amount of it. And the bank cannot escape liability to the payee for the amount of the check by saying that what it did in receiving the check and in paying it, and in debiting to the account of the drawer, was all through mistake; for that would be to suffer it to escape the consequences of its own mistake by pleading its own negligence as a defense. *Id.*
16. **DELIVERY OF BANK CHECK ESSENTIAL TO PAYEE'S RIGHT TO RECOVER THEREON.** — The payee of a bank check cannot maintain an action thereon against the bank on which it is drawn, unless it has been delivered to him by the drawer. *Id.*
17. **RATIFICATION OF UNAUTHORIZED DELIVERY OF BANK CHECK.** — The payee of a bank check may adopt and ratify an unauthorized delivery of the check to a stranger who, without authority, presents it to and receives payment thereof from the bank on which it is drawn. And the bringing of suit by the payee is a sufficient ratification by him of the unauthorized delivery. *Id.*
18. **AUTHORITY TO RECEIVE CHECK PAYABLE TO ORDER IMPLIES NO AUTHORITY TO INDORSE IT** in the name of the payee, or to collect it without such indorsement. *Id.*
19. **NECESSITY OF PRESENTATION OF CHECK WHEN NO FUNDS ARE ON DEPOSIT.** — Presentation of a check for payment and notice of non-payment to the drawer are not necessary when the latter has no funds on deposit for the payment of the check at the time when it should be presented, or when, having funds on deposit, he withdraws them, or when, by consent of the drawer, or agreement between him and the payee, the check is not to be presented for payment. *Culver v. Marks*, 377.
20. **CHECKS — PRESUMPTION AS TO BANK DRAWN AGAINST.** — Checks dated "Lafayette, Indiana," and drawn on the "First National Bank," the evidence showing that there was such a bank at that place, are presumed, in the absence of anything to the contrary appearing, to relate to and to have been drawn upon that bank. *Id.*
21. **CHECKS DRAW INTEREST** from the time when presented, or when they

- or higher rate of fare to those who do not procure tickets before entering the cars, provided passengers are given a convenient place and opportunity to buy tickets. *Roece v. Pennsylvania R. R. Co.*, 818.
4. **REGULATIONS — FARES AND TICKETS.** — A regulation requiring passengers who board a train without a ticket, after having had an opportunity to procure one, to pay a small sum in excess of the regular fare, such excess to be refunded at any regular ticket-office on the road, upon presentation of a check therefor, given by the conductor, is valid, and not unreasonable nor oppressive, nor open to the objection that the excess thus imposed is a part of the fare, and makes it higher than the rate allowed by law. *Id.*
 5. **REGULATIONS — FARES AND TICKETS.** — A regulation requiring that a sum in excess of the regular fare shall be collected from passengers who board a train without having procured a ticket, after having had an opportunity to do so, such excess to be refunded at any regular ticket-office on the road, upon presentation of a check given therefor by the conductor, but excepting from its operation passengers getting on trains at stations where no tickets are sold, or where, on account of an excessive rush of business, it is impossible to issue the refunding check, and providing that in such cases the collection of the excess shall be omitted, is valid, and not unreasonable, oppressive, or partial. *Id.*
 6. **RULES AND REGULATIONS.** — Railroad companies have the right to adopt reasonable rules as to the method of paying fares by passengers, and to discriminate between fares paid in the cars and at stations, and to remove from the cars, in a proper manner and at a proper place, persons who refuse to comply with such regulations. *McGowan v. Morgan's & R. R. & S. S. Co.*, 415.
 7. **RULES AND REGULATIONS.** — A railroad regulation, requiring passengers who do not procure tickets before the commencement of the journey to pay an extra amount of fare, and providing that a coupon shall be given the passenger on which he may collect the extra fare from any agent at a station, and exempting from its operation such passengers as board the trains at stations where tickets are not sold, is reasonable and valid. *Id.*
 8. **CARRIERS OF PASSENGERS MUST EXERCISE THE UTMOST CARE AND PRE-
DENCE** which human foresight can suggest to secure their safety. This vigilance, if the carrier is a railroad corporation, is to be exercised by it to see that its road, and the appurtenances used in operating it, are and remain in good condition and free from defects. *Palmer v. Delaware & Canal Co.*, 629.
 9. **LATENT DEFECT WHICH WILL RELIEVE A CARRIER OF PASSENGERS FROM
RESPONSIBILITY** is such only as no reasonable degree of human skill and foresight could guard against. *Id.*
 10. **NEGLIGENCE — RAILROAD CORPORATIONS MAY BE HELD LIABLE FOR
INJURIES RESULTING TO A PASSENGER BY THE BREAKING OF A SPINDLE** of a draw-bar used to connect cars together as a train, if the evidence tends to show the existence of a flaw in such spindle, which may have been in it before it was put to use on the car. When it was made to be put on a car, the duty of the corporation was to apply all known tests to ascertain whether it was, in all respects, fit for the purpose it was intended to serve, and if, in consequence of the failure to do so, the defect was not discovered, and the accident occurred, the corporation is liable. *Id.*

11. **NEGLIGENCE — QUESTION FOR JURY.** — Where an accident has occurred from the breaking of spindle used to connect cars in a train, and it appears that such spindle had not been inspected during the two years it had been in use, and that the removal and inspection of it were not within the system of inspection adopted by the defendant, it is for the jury to determine, under proper instruction from the court, whether the defendant had been guilty of a want of due care. *Id.*
12. **WHILE THE PERFORMANCE OF THE DUTIES OF A CARRIER OF PASSENGERS IS TEMPORARILY SUSPENDED** until it can make arrangements to overcome a difficulty occasioned by a washout of its road-bed, its passengers continue entitled to all of the rights which pertain to passengers on a train moving towards the point of destination stipulated for in the contract of the carrier. *Drinelle v. New York etc. R. R. Co.*, 611.
13. **DUTY TO PROTECT PASSENGERS.** — Among the obligations which a carrier assumes is that of protecting its passengers against any injury from the negligence or willful misconduct of its servants, and of their fellow-passengers and strangers, so far as practicable, and to provide them with the usual accommodations and any information and facilities necessary for the full performance of the contract on the part of carrier. *Id.*
14. **PORTER OF SLEEPING OR DRAWING-ROOM CAR IS A SERVANT OF THE RAILROAD COMPANY**, for whose misconduct it is answerable, though it does not own such car, nor hire nor pay such porter, if the car is run on its road under a contract between it and the sleeping-car company which required that the servants employed by the latter should be acceptable to the railroad company. *Id.*
15. **PERSONS IN CHARGE OF A DRAWING-ROOM OR SLEEPING CAR** are to be regarded and treated, with respect to their dealings with passengers, as servants of the railroad company, which is answerable for their acts to the same extent as if they were directly employed by it. The law will not permit a railroad company engaged in the business of carrying passengers for hire, through any device or arrangement with a sleeping-car company, whose cars are used by the railroad company, and constitute a part of its train, to evade any duty imposed on it, by interposing the defense that a porter on a sleeping-car was not a servant of the railroad, but of the sleeping-car company. *Id.*
16. **QUESTION FOR THE JURY.** — Whether a porter of a sleeping-car was not, at the time he committed an assault on a passenger, acting as a servant of a railroad company is a question for the jury, when it appears that such porter was the only person put forward or presented in the sleeping-car to perform the duty and service the railroad company owed such passenger. *Id.*
17. **FOR A WILLFUL AND MALICIOUS ASSAULT BY A SLEEPING-CAR PORTER UPON A PASSENGER**, the railroad company is answerable, because every carrier of passengers undertakes absolutely to protect them against the misconduct of its own servants, engaged in executing its contract of carriage. *Id.*
18. **A PASSENGER IS ENTITLED TO ALL INFORMATION** requisite to enable him to pursue his journey with safety and dispatch. His duty is to make all necessary inquiries, and the corresponding duty of the carrier is to give the information sought. *Id.*
19. **A SLEEPING-CAR PORTER, WHO MAKES AN ASSAULT ON A PASSENGER** while the latter is seeking of him information necessary to enable the

passenger to pursue his journey in another train which the carrier had provided for his transportation, may be regarded as in the service of the company, and the passenger may therefore recover from it compensation for injuries suffered from such assault. *Id.*

20. **RIGHT TO EXCLUDE SICK PASSENGER.** — A common carrier by street-railway owes obligations to and is bound to protect both its sick and its well passengers, and when the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. This right of exclusion cannot be exercised arbitrarily or inhumanely, or without due care and provision for the safety and well-being of the ejected passenger, and for any abuse of this right, or oppression in its exercise, the carrier is responsible in damages. *Conolly v. Crescent City R. R. Co.*, 389.
21. **STREET-RAILWAYS — DUTY TO SICK PASSENGER.** — Where a passenger on a street-car, who has been conveyed a considerable distance without voluntary misconduct on his part, is suddenly stricken with apoplexy, and thus rendered helpless and speechless, and subject to severe fits of vomiting, his removal from the car, by the driver, into the roadway of the street, and leaving him there, on an inclement day, without the slightest attempt at that time or afterward to have him taken care of, is a gross violation of duty, for which the carrier is liable in damages, nor will the mistaken supposition of the driver, that he was drunk at the time of his exclusion, excuse the carrier's liability. *Id.*
22. **DUTY TO SICK PASSENGER — PRESUMPTION.** — An expressed desire by a passenger by street-railway, after being stricken with apoplexy, to leave the car while he thought he was able to do so and to take care of himself, will not raise the presumption that he desired to be removed into the street, and there left without care and attention after he had fallen down in an utterly helpless condition. *Id.*
23. **NEGLECT — A PASSENGER'S RESTING HIS ARM ON THE WINDOW-SILL** of the open window of a car, with his elbow slightly projecting outside, is not negligence *per se*, irrespective of the fact whether an injury to him occurred to the exposed part of the arm, or not. *Mosler v. Willamette etc. R'y Co.*, 717.
24. **NEGLECT, WHEN QUESTION OF FACT.** — Where a passenger riding with his arm resting on the window-sill of an open window of a car, with his hand inside, but his elbow extending a few inches outside the window, is struck by a stick of cord-wood falling from a pile near the track, through the window, upon the palm of his hand, or near it, so as to catch in the mouth of his coat-sleeve, and jam his arm backward, breaking it, and badly lacerating his hand and arm, the facts are not such as will authorize the court in declaring the act of the passenger to be negligence *per se*, and ordering a nonsuit. The question of contributory negligence on the part of the passenger should be left to the jury. *Id.*
25. **DUTY TO STOP AT STATION — CONTRIBUTORY NEGLIGENCE OF PASSENGER IN JUMPING FROM MOVING TRAIN.** — While a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such station without stopping does not justify the passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the company; and the voluntary act of the passenger in so jumping, in the absence of such invitation, and of in-

pending danger or necessity, is such contributory negligence on his part as will defeat his right of recovery. *Walker v. Vicksburg etc. R. R. Co.*, 417.

See CONTRACTS, 6-8.

CHATTEL MORTGAGES.

NOTICE OF A CHATTEL MORTGAGE CANNOT BE INFERRED from the fact that a public sale was made thereunder, in a county other than that in which the property was situated, and in which the person sought to be affected with notice resides. *London v. Youmans*, 17.

See AUCTIONS AND AUCTIONEERS; EXECUTIONS, 2; FIXTURES.

CHECKS.

See BANKS AND BANKING, 7-26; PAYMENT, 7-9.

C. O. D. SALES.

See SALES, 7-10.

CODICILS.

See WILLS.

COHABITATION.

See MARRIAGE AND DIVORCE, 1, 2.

COMITY.

See STATUTES, 2.

COMMISSIONERS.

See CONSTITUTIONAL LAW, 1-4.

COMMON CARRIERS.

See CARRIERS.

COMPLAINT.

See PLEADING, 2; VENDOR AND VENDEE, 12.

CONDITIONAL PAYMENT.

See PAYMENT, 7-9.

CONDONATION.

See MARRIAGE AND DIVORCE, 2.

CONFIRMATION.

See JUDICIAL SALES, 2-5.

CONFLICT OF JURISDICTION.

See JURISDICTION.

CONFLICT OF LAWS.

See CONTRACTS, 1, 2; EXEMPTIONS, 1, 2; TELEGRAPH COMPANIES.

CONSIDERATION.

See NEGOTIABLE INSTRUMENTS, 7, 10, 11.

CONSTITUTIONAL LAW.

1. SUPREME COURT COMMISSIONERS. — A statute granting to the supreme court the power to appoint commissioners thereof whose duty it shall be, under such rules and regulations as the court may adopt, to assist it in the performance of its duties and in disposing of undetermined cases before it, is not unconstitutional, nor open to the objection that under it such commissioners are vested with judicial power. *People v. Hays*, 211.
2. PRESUMPTION IN FAVOR OF CONSTITUTIONALITY OF STATUTE is always indulged, and if the language employed is capable of two or more constructions, any one of which is in harmony with the constitution, it is the duty of the court to give it that construction. One who attacks the constitutionality of such an enactment must not only overcome the strong presumption in favor of its validity, but must also show that by the natural and necessary import of the language used it is in conflict with the supreme law. *Id.*
3. SUPREME COURT COMMISSIONERS NOT VESTED WITH JUDICIAL POWER. — The power vested in a supreme court commission appointed by the court to examine causes submitted to the court, and to report facts or conclusions in the form of opinions to it for its judgment, is not judicial, within the meaning of the constitution; and when the court retains the inherent power not only to decide but to make all binding orders or judgments in such cases, this constitutes the only exercise of judicial power. *Id.*
4. SUPREME COURT COMMISSIONERS — INFLUENCE ON COURT. — An objection against a supreme court commission appointed by the court, that the reports and opinion of the commission in cases submitted to it are likely to or may have an undue influence on the court in its subsequent consideration of such cases, and in the rendition of judgments thereon, does not go to the constitutionality of the law under which the commission is appointed, nor tend to show that the commissioners are usurping judicial power. *Id.*
5. THE POLICE POWER OF THE STATE is the authority, vested in the legislature by the constitution, to enact all such wholesome and reasonable laws, not in conflict with the constitution of the state or the United States, as they may deem conducive to the public good. *State v. Mearns*, 696.
6. THE POLICE POWER UNDER OUR SYSTEM OF GOVERNMENT HAS BEEN LEFT TO THE STATES, and the only limit to its exercise in the enactment of laws is, that they shall not prove repugnant to the provisions of the state or national constitution. *Id.*

See MUNICIPAL CORPORATIONS, 11; PARENT AND CHILD; STATUTES; TAXATION, 1, 2.

CONSTITUTIONS.

See STATUTES, 3.

CONTEMPT.

See MARRIAGE AND DIVORCE, 11.

CONTRACTS.

1. **CONFLICT OF LAWS—IF A CONTRACT IS VALID BY THE LAWS OF ONE STATE, AND INVALID BY THOSE OF ANOTHER,** the parties are presumed to incorporate in the contract the law which would make it operative. *Carey v. Mackey*, 500.
2. **CONFLICT OF LAWS.** — If a husband and wife, residents of Florida, temporarily residing in Maine, enter into a contract in the latter state, for their separation, and that he will pay her a monthly allowance for her support, such contract will be enforced in Maine, though not valid under the laws of Florida. *Id.*
3. **PAROL EVIDENCE TO VARY.** — A new and distinct agreement made subsequently to a contract under seal, whereby, upon a new consideration, the original contract was changed, and an agreement entered into to perform additional work, or the same work in a different manner, may be proved by parol, without violating the rule that extrinsic evidence is not admissible to contradict or alter a written instrument. The deviation, except where otherwise expressed or mutually understood, must be taken in its proper connection with the original contract, with reference to and in modification of which it is made, and the special contract will be pursued as far as it can be traced in the intention of the parties. *McCauley v. Keller*, 758.
4. **SUBCONTRACT GOVERNED BY TERMS OF ORIGINAL CONTRACT.** — Where a written contract calling for a certain class of work provides that all work is to be done as directed by the engineer in charge, and is to be paid for as estimated by him, and such contract is subsequently changed by a subcontract resting in parol, calling for a better class of work, the estimate of the engineer, made fairly and without fraud, as to the value of the work performed under the subcontract, is final and conclusive on the parties, and not open to the opinion of those who casually observed the work. *Id.*
5. **CONTRACT TO DEAL IN FUTURES IS GAMING CONTRACT, AND VOID** by express statute, which makes it a crime, and punishes it as such. *Snoddy v. Bank*, 918.
6. **CONTRACTS TO STIFLE COMPETITION IN TRADE VOID AS AGAINST PUBLIC POLICY.** — All contracts which have a palpable tendency to stifle competition and create monopolies, either in the market value of commodities, or in the carriage or transportation thereof, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which courts can recognize or enforce. *Texas etc. Ry Co. v. Southern etc. Ry Co.*, 445.
7. **RAILROAD POOL TENDING TO STIFLE COMPETITION ILLEGAL.** — A railroad pool, or agreement and arrangement between two competing railroads between given points to divide equally between them their earnings from competitive tariff between such points, is illegal as against public policy, and does not therefore confer upon the parties to it any rights which courts can recognize or enforce. *Id.*
8. **CONTRACTS TO STIFLE COMPETITION.** — In refusing to enforce contracts which have a palpable tendency to stifle competition, or to create or foster a monopoly, courts will not decree the nullity of the contract sued on, but simply abstain from dealing with it, or from discussing any of its effects as between the parties; hence aid will not be given to secure an otherwise fair division of the results of the illegal contract between the parties. *Id.*

9. **WHETHER FOR SALE OR MANUFACTURE.** — A contract to manufacture certain engravings and lithographs for theatrical purposes, to be taken and paid for during the succeeding theatrical season, is not a contract of sale, but one for the manufacture of goods merely; and the engravings and lithographs, when manufactured, become the property of the person who contracted for them, and if they are burned before delivery to him, he must bear the loss, and cannot successfully resist an action to recover the contract price of the work. *Central Lithographing etc. Co. v. Moore*, 186.
10. **REMEDY FOR NOT ACCEPTING GOODS MANUFACTURED.** — One who employs another to manufacture goods or to construct machinery, but who fails or refuses to call for or accept such goods or machinery, when completed and set aside for him, is liable to an action for not accepting as he agreed to do. *Id.*
11. **INJUNCTION AGAINST BREACH OF BY ACROBATS.** — Where services contracted for are unique and extraordinary, involving such special merit or qualifications as to make them distinctly personal and peculiar, so that in case of default the same or like services could not be easily procured nor compensated in damages, an injunction will issue to prevent a breach of the contract, although it contains no negative stipulation. But if such services are ordinary and without special merit, and such as can be readily supplied or obtained without difficulty or expense, the court will not interfere by injunction to prevent a breach of the contract. Injunction will not issue to prevent acrobats from violating their contract with a theatrical manager, by performing at a rival theater, if their performances are not unique or unusual in character, but are those of ordinary acrobats or tumblers. *Cort v. Laseard*, 726.
12. **EQUITY — REFORMATION OF CONTRACTS.** — A WRITTEN EXECUTORY CONTRACT FOR THE SALE OF LANDS CANNOT BE REFORMED BY ENLARGING IT through the aid of parol evidence, so as to include lands not embraced within its descriptive words. *Davis v. Ely*, 667.
13. **PLEADING PRESUMPTION IN AID OF COMPLAINT.** — It will not be presumed in aid of a complaint assailed by demurrer that defendant was guilty of a breach of contract, for that must be affirmatively alleged by plaintiff as one of the elements of his cause of action. *Little City etc. Ins. v. Wagner*, 342.

See MASTER AND SERVANT, 21-25; TELEGRAPH COMPANIES.

CONTRACTS OF SALE.

See SALE.

CONTRACTS FOR SALE OF REALTY.

See VENDOR AND VENDEE.

CONTRIBUTION.

See SURETYSHIP, 3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

See AUCTIONS AND AUCTIONEERS.

CORPORATIONS.

1. **POWERS EXPRESSED AND IMPLIED.** — Corporations can only exercise such powers as may be conferred either in express terms or by necessary implication, and such implied powers as are presumed to exist to enable them to carry out the express powers granted, and to accomplish the purposes of their creation. *People v. Chicago Gas Trust Company*, 319.
2. **AN INCIDENTAL POWER IS ONE** that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. *Id.*
3. **POWER TO ACQUIRE STOCK IN ANOTHER.** — Where a charter in express terms confers upon a corporation power to maintain works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist, nor does it exist without legislative authority, although such corporation might take the stock of another corporation in payment or security for a debt. *Id.*
4. **POWERS UNDER GENERAL LAW.** — The charter of a corporation formed under a general law conferring upon it only the ordinary corporate powers does not consist of the articles of incorporation alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form part of the charter. *Id.*
5. **ACQUISITION OF STOCK IN ANOTHER CORPORATION — POWER UNDER GENERAL LAW.** — The power of a corporation to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in those where it cannot be implied from the powers expressly granted, and in such cases the corporation cannot clothe itself with such power by merely naming it in its articles of incorporation, as the official act of issuing the license and certificate of organization is to a large extent merely ministerial. *Id.*
6. **POWER UNDER GENERAL LAW.** — Where a corporation is formed under the general law, such law, and not its articles of incorporation, must determine what powers can be exercised as incidents to its business; and when such law expressly restricts the powers of the corporation to such as are necessary and requisite to carry into effect the object for which it was formed, a corporation organized for the purpose of engaging in the business of making and selling gas cannot purchase stock in other gas companies, as that is not necessary to carry such purpose into effect, and not only is not expressly granted by such act, but is impliedly prohibited thereby. *Id.*
7. **POWERS UNDER GENERAL LAW.** — Powers obtained by corporations under general laws are necessarily restricted to those mentioned in the act. The charter is void as to all powers and privileges granted beyond the provisions of the statute, and if unauthorized provisions are added to the articles of incorporation, all such provisions, and the acts done pursuant thereto, are void, and such articles must be construed strictly as against the grantee, and in favor of the government or general public. *Id.*
8. **POWER TO PURCHASE OR HOLD STOCK IN ANOTHER CORPORATION.** — A corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas has no power to purchase and hold or sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation. *Id.*

9. **PLEA OF CORPORATE POWER, WHEN INSUFFICIENT.** — A plea by a corporation of its power under its charter to buy and hold the stock of another corporation is insufficient, and subject to demurrer, when it only alleges generally that the power in question was among those granted by the charter; the plea must set forth particularly and in detail the facts showing how such corporate power was conferred upon or acquired by the corporation. *Id.*
10. **POWER TO PURCHASE AND HOLD** the capital stock of another corporation conferred upon one corporation would include power to acquire all the stock of such other corporation. *Id.*
11. **CORPORATION CREATING MONOPOLY ILLEGAL.** — A corporation organized with the object of purchasing and holding all the shares of the capital stock of any gas company within the state of Illinois is not organized for a lawful purpose, within the meaning of her incorporation laws, and all acts done by it toward the accomplishment of such object are illegal and void. *Id.*
12. **UNLAWFUL PURPOSE AND ACTS.** — The word "unlawful," as applied to corporations within the meaning of a general incorporation law, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or in other words, such acts, powers, and contracts as are *ultra vires*. *Id.*
13. **CANNOT CREATE MONOPOLY.** — The business of making and distributing illuminating gas for the use of a city is a business of a public character, and corporations engaged in such business owe a duty to the public; any unreasonable restraint upon the performance of such duty is prejudicial to the public interest, in contravention of public policy, and void. *Id.*
14. **MONOPOLY VOID AS AGAINST PUBLIC POLICY.** — Whatever tends to create a monopoly, and to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy, and therefore unlawful. *Id.*
15. **PUBLIC POLICY** — COURTS MUST REFUSE TO SUSTAIN that which is against the public policy of the state, when such public policy is manifested by the legislative or fundamental law of the state. *Id.*
16. **CORPORATION CREATING MONOPOLY ILLEGAL.** — When a corporation is organized under a general statute, a provision in the declaration of its corporate purposes the necessary effect of which is to create a monopoly is void as against public policy. *Id.*
17. **SUBSCRIBERS TO STOCK OF PROPOSED CORPORATION BECOME SHARE-HOLDERS WHEN.** — The moment the conditions required by law as preliminary to the granting of a charter to a corporation are complied with, the subscribers to its stock become share-holders, entitled, as such, to a voice in all subsequent proceedings, and at the same time their liability to pay the amount of their shares becomes fixed and absolute. *Cartwright v. Dickinson*, 910.
18. **ISSUANCE OF STOCK CERTIFICATE IS NOT NECESSARY TO MAKE ONE SHARE-HOLDER** in a corporation. Such certificates are mere evidences of the ownership of shares. *Id.*
19. **CORPORATION HAS NO POWER TO FORFEIT, CANCEL, OR ANNUL SHARES** of its stock once lawfully issued, unless its charter authorizes a forfeiture of shares for non-payment of calls. One subscriber can be released from liability only by the consent of all. *Id.*

1. **UNAUTHORIZED RELEASE OF SHARE-HOLDER NOT AIDED BY OBTAINING NEW SUBSCRIBERS IN HIS PLACE.** — The unauthorized release by a corporation of one of its share-holders from the payment of his subscription is not made valid by procuring additional subscriptions to take the place of that released, whether the new subscriptions be void or valid. *Id.*
1. **CORPORATION CANNOT REDUCE ITS AUTHORIZED CAPITAL BY PURCHASING ITS OWN SHARES** for cancellation. *Id.*
2. **SUBSCRIPTIONS IN EXCESS OF AUTHORIZED CAPITAL OF CORPORATION VOID.** — Subscriptions for new shares in the stock of a corporation, after its full authorized capital stock has been taken and subscribed, are null and void. *Id.*
3. **VIOLATION OF CHARTER OF CORPORATION NO DEFENSE TO ACTION FOR SUBSCRIPTION.** — The fact that a corporation has violated its charter is no defense to an action for calls due from a share-holder upon his shares. His remedy is against the corporation to restrain such illegal action. *Id.*
4. **SHARE-HOLDER OF CORPORATION NOT RELEASED FROM HIS SUBSCRIPTION BY REASON OF HIS OWN MISTAKE.** — A share-holder is not released from liability for his subscription, where, through his mistake of law or fact, he supposed his contract of subscription had been properly canceled, and therefore ceased to act as a share-holder in the corporation, although the corporation afterwards became insolvent under management in which he did not participate. *Id.*
15. **OFFICER OF CORPORATION IS AGENT OF SHARE-HOLDER WHEN.** — An officer of a corporation who undertakes for a share-holder to obtain a release or cancellation of his subscription becomes the agent of the share-holder in the matter, and the share-holder, and not the corporation, is responsible for his acts as such agent. *Id.*
16. **ASSIGNEE OF INSOLVENT CORPORATION, RIGHTS OF, UNDER GENERAL ASSIGNMENT.** — An assignee for the benefit of creditors of an insolvent corporation has the right, and it is his duty, to collect unpaid subscriptions due from delinquent share-holders, and apply the proceeds to the payment of the creditors, or pay them over to the assignors, in case there is a surplus. And he has the right to maintain suits necessary for the accomplishment of those objects. *Id.*
17. **PROMOTERS OF A CORPORATION WHO ON ITS FORMATION become officers thereof must be treated as its agents and trustees, and held accountable to it for any profits which they realize upon property bought for and sold to the corporation.** *Pittsburg Mining Co. v. Spooner*, 149.
28. **IF PROMOTERS OF A CORPORATION HAVE OBTAINED AN OPTION** for the purchase of property at a certain price, and have proceeded to form a corporation, representing to persons whom they induced to subscribe for its stock that such option would cost a larger price than they have agreed to pay, and if, after procuring such subscription, they purchase the property at the smaller price and charge the corporation the higher, it may sustain an action against them, and recover the difference between the two prices. *Id.*
29. **CORPORATION MAY MAINTAIN AN ACTION AGAINST ITS PROMOTERS** to recover profits realized by them from the sale of property to the corporation at a sum which they represented to be the cost price, but which was in fact in excess of such price. *Id.*
30. **AGENTS RECEIVING MONEYS UPON ILLEGAL SALE OF STOCK OF A CORPORATION CANNOT SET UP THE ILLEGALITY** of the transaction as a defense to an action by the corporation to compel them to account therefor. *Id.*

31. **RESTOPPEL TO CONTEST VALIDITY OF FORMATION OF.** — PERSONS WHO HAVE BEEN INSTRUMENTAL in the formation of a corporation and in issuing alleged illegal stock, and who have contracted with the corporation with full knowledge of all its transactions, are not in a position to contest the regularity of its formation. *Id.*
32. **DIRECTORS ARE BOUND TO MANAGE THE AFFAIRS OF A CORPORATION WITH THE SAME DEGREE OF CARE** and prudence which is generally exercised by business men in their own affairs. They must be diligent and careful in performing the duties they have undertaken, and they cannot excuse any imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences. *Marshall v. Farmers' etc. Bank*, 84.
33. **DIRECTORS OF A CORPORATION WHO VOTED FOR A RESOLUTION TO PAY AN OFFICER A SALARY TO WHICH HE WAS NOT ENTITLED**, but who did not participate in a subsequent resolution that such salary should be paid by the issuing of negotiable notes of the corporation, are not answerable for damages to the corporation resulting from the issuing and negotiation of such notes. *Metropolitan E. R'y Co., v. Kneeland*, 619.
34. **ONE WHO RECEIVES FROM AN OFFICER OF A CORPORATION ITS NOTES OR SECURITIES IN PAYMENT OF OR AS A SECURITY FOR THE PERSONAL DEBT OF SUCH OFFICER** does so at his peril. *Prima facie*, the act is unlawful, and unless authorized, the purchaser will be deemed to have taken with notice of the rights of the corporation. *Wilson v. Metropolitan Elevated R'y Co.*, 625.
35. **WHEN A NOTE OF A CORPORATION IS MADE PAYABLE TO ITSELF, AND OFFERED FOR DISCOUNT BY ITS PRESIDENT**, any intended purchaser is thereby subjected to the burden of inquiry whether the issuance of the note was authorized, but if an inquiry, if made, would have resulted only in ascertaining that such issuance was authorized by a resolution of the board of directors in due form, the purchaser must be regarded as a *bona fide* holder for value, though he made no inquiry, and the resolution was one which the directors unlawfully adopted to provide means for the payment of the salary of the president, to which he was not entitled. *Id.*
36. **ACTION MAY BE MAINTAINED AGAINST THE DIRECTORS OF A CORPORATION FOR FRAUDULENTLY ISSUING AND NEGOTIATING PROMISSORY NOTES** in its name, which have reached the hands of *bona fide* purchasers for value, and have thereby become legal obligations against the corporation, though payment thereof has not been made. *Metropolitan Elevated R'y Co. v. Kneeland*, 619.
37. **PROOF OF FRAUDULENT SALE BY.** — Where the good faith of a sale by a corporation to one of its directors is attacked, evidence of the insolvency of the corporation at the time that the sale was made is admissible. *Beach v. Miller*, 291.
38. **SOLVENT CORPORATION — DIRECTOR MAY CONTRACT WITH.** — A director of a solvent corporation may, with the knowledge of the stockholders, deal with the corporation, loan it money, take security, or buy property of it in like manner as a stranger. *Id.*
39. **INSOLVENT CORPORATIONS — DIRECTORS CANNOT CONTRACT WITH.** — The assets of an insolvent corporation are regarded as a trust fund for the payment of all its creditors; the directors occupy the position of

trustees of such fund, and may be prohibited from purchasing the trust property, and thus securing a preference over other creditors. *Id.*

40. **INSOLVENT CORPORATIONS — RIGHTS OF CREDITORS.** — The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of the other creditors. *Id.*
41. **INSOLVENT CORPORATION — PURCHASE BY DIRECTOR — RIGHTS OF CREDITORS.** — A director of an insolvent corporation cannot lawfully purchase its property in satisfaction of his own debt, to the exclusion of other creditors, with whom he is only entitled to share equally, but he takes the property charged with the trust in favor of the other creditors, which may be enforced in equity, but it is not subject to the execution of another judgment creditor. *Id.*
42. **SALE TO DIRECTOR — RATIFICATION.** — A sale of corporate property, made by a corporation to a director, in payment of its notes held by him, though irregular because made without an order from the board of directors, is subject to ratification, and the fact that the corporation took up the notes canceled and retained them in its possession will be regarded as a ratification of the sale. *Id.*
43. **DEED BY, AS ATTORNEY IN FACT.** — A corporation may execute a valid deed of conveyance of real property as the attorney in fact of another, in the absence of statutory or charter provisions to the contrary. *Killingsworth v. Portland Tr. Co.*, 737.
44. **POWER OF, TO CONVEY BY DEED AS AGENT.** — A corporation has a right to conduct its legitimate business by all means necessary to effect its object, and, within its prescribed range, can do whatever a natural person could do. In the absence of charter or statutory provision forbidding, it may act as the agent, either for an individual, partnership, or another corporation, by power of attorney, to sell and convey real property, and performance of its engagements through its agents does not involve a delegation of powers. *Id.*

See **BANKS AND BANKING; NEGOTIABLE INSTRUMENTS, 2.**

COSTS.

1. **AN UNSUCCESSFUL INTERPOSITION OF A PETITION FOR HOMESTEAD EXEMPTION** in an ordinary action does not prevent the plaintiff from recovering his costs. *Ex parte Karish*, 865.
2. **COSTS ARE MERELY INCIDENTAL TO AN ACTION** based upon a sufficient cause, and if the cause of action is removed or discharged by payment, the action cannot be further prosecuted merely to recover the costs thereof. *Two Rivers Mfg. Co. v. Beyer*, 131.
3. **THE RIGHT TO COSTS IS EXTINGUISHED BY ACCEPTANCE OF PAYMENT OF THE DEBT**, either before or after the commencement of the action, and thereafter the court has no power to render judgment for costs. If there is no judgment on the cause of action there can be no further costs. *Id.*
4. **VOID JUDGMENT FOR COSTS.** — Where there is no power in a court to impose payment of costs, a judgment therefor is void. *Id.*

CO-SURETY.

See **SURETYSHIP.**

CO-TENANCY.

See PARTITION.

COUNTERCLAIM.

See HUSBAND AND WIFE, 12.

COVENANTS.

See LANDLORD AND TENANT, 1.

CREDITOR'S BILLS.

1. LIEN OF CREDITOR'S BILL. — The filing of a creditor's bill and the service of process thereon create a lien on the equitable assets of the judgment debtor, without the issuance of an injunction or the appointment of a receiver, and no voluntary assignment by the debtor, nor intervening claims of other creditors, can impair the lien thus created. *King v. Goodwin*, 277.
2. LIEN OF CREDITOR'S BILL. — The lien upon equitable assets acquired by a creditor's bill is not extinguished by the death of the debtor before the appointment of a receiver, but survives against such assets in the hands of the administrator. *Id.*
3. LIEN OF CREDITOR'S BILL SUPERIOR TO WIDOW'S AWARD. — The widow's claim to her award is against the estate of her deceased husband; and if there is no estate, she has nothing to rely upon for the payment of the award. If the estate is encumbered by a valid lien, created by a creditor's bill, the award does not set aside the lien, and she has only a claim on so much as may be left after satisfying the lien. *Id.*
4. PARTIES. — Question of necessity of the receiver being a party to a creditor's bill should be raised by demurrer. *Id.*

CRIMINAL CONVERSATION.

See HUSBAND AND WIFE, 14.

CRIMINAL LAW.

1. INDICTMENT — JOINDER OF COUNTS IN. — Where an indictment containing two counts for the same act, one charging robbery, and the other larceny as bailee, against the defendant, is certified to the proper court for the trial of the higher offense, the defendant may be there tried and convicted of the larceny as bailee, although acquitted upon the count charging robbery. *Commonwealth v. Skutte*, 773.
2. UNDER INDICTMENT charging a particular crime, the defendant may be convicted of a lesser offense included within it. *Id.*
3. COURT IS NOT PROHIBITED FROM INSTRUCTING JURY, IN ADVISORY FORM, AS TO LAW in a criminal case by a constitutional provision that "in the trial of all criminal cases the jury shall be the judges of law as well as of fact," when the jury unanimously request such instruction. *Beard v. State*, 536.
4. JURY — INTOXICATION. — VERDICT AND SENTENCE WILL BE SET ASIDE, where it appears that members of the jury, during their deliberations, were allowed to indulge in an excessive use of intoxicating liquors, and the consumption of a pint and a half of whisky by two members of the jury between the hours of midnight and the following eleven o'clock,

rendering them sick at the time that the verdict was reached, in such excessive use of such liquor as will avoid the verdict. *State v. Broussard*, 396.

5. **EVIDENCE — PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE.** — When a defendant in a criminal case has offered himself as a witness in his own behalf, but has not testified in chief to any communications between his wife and himself, he cannot, without his consent, be cross-examined as to any such communications, although, since the time they are claimed to have been made, the husband and wife have been divorced. *People v. Mullings*, 223.
6. **OBJECTIONS TO CLASS OF INCOMPETENT TESTIMONY NEED NOT BE REPEATED.** — Where objection has been clearly and pointedly made and overruled several times to a certain line or class of testimony as privileged communications between husband and wife, and therefore inadmissible, the objection need not be repeated to every question of the kind asked, especially when a motion to strike out all such evidence is made and overruled at the close of the examination of the witness. *Id.*
7. **CONDITIONAL PARDON.** — A pardon granted a party sentenced to two years' imprisonment, after he has served part of his term, on "condition that he shall leave the state within forty-eight hours, never to return," is not illegal, and upon his return six years after having accepted the benefit of the pardon, he may be recommitted to prison, to serve the remainder of the unexpired term. *State v. Barnes*, 832.
8. **FORCEFUL ENTRY.** — To constitute offense of forcible entry or forcible trespass, there must be either actual violence used, or such demonstration of force as is calculated to intimidate or alarm, or as involves or tends to a breach of the peace. Hence the offense is not established by proof that the defendant went to a house occupied by the plaintiff, said it was his, that he intended to take possession of it, and, though forbidden by plaintiff to enter, entered such house, whereupon the plaintiff, to avoid a difficulty, went away, leaving the defendant in possession. *State v. Mills*, 706.
9. **DISORDERLY HOUSE, WHAT IS.** — A bar-room and dance-hall, with music, kept for the purpose and with the intent of bringing together and entertaining prostitutes, and men desirous of their company, and where such persons habitually assemble to drink and dance together, is a disorderly house, although it is quietly kept, and no conspicuous improprieties are permitted inside. *Beard v. State*, 536.
10. **BAWDY-HOUSE, KEEPING OF.** — An indictment against a woman for the keeping of a bawdy-house is not sustained by proof that both she and her daughters, who resided with her, were lewd women, and she and they, with her knowledge, frequently had sexual intercourse, in and about her house, with men other than their husbands. *State v. Calley*, 704.
11. **BAWDY-HOUSE.** — The living together of lewd women, doing acts of prostitution in their house, or in the house of one of them, does not constitute the offense of keeping a bawdy-house. *Id.*
12. **DISORDERLY HOUSE.** — The crime of keeping a disorderly house is not established against a woman by proof that she and her daughters, who resided with her, committed frequent acts of prostitution, which acts were not committed in so public a manner as to disturb the neighborhood or passers-by. *Id.*
13. **EVIDENCE ADMISSIBLE UNDER INDICTMENT FOR MAINTAINING DISORDERLY HOUSE.** — Under an indictment for keeping a disorderly house, and per-

mitting lewd persons to frequent it, it is competent to prove, by witnesses, the reputation for lewdness of the woman who frequented the house, that they frequented the house in company with men, and also specific acts of lewdness committed by some of the women elsewhere. *Beard v. State*, 536.

14. **MURDER — CROSS-EXAMINATION OF "ACCUSED.** — Where a defendant charged with murder becomes a witness in his own behalf, and denies the killing, a wide range of cross-examination may be allowed, because of the general nature of defendant's statement. *People v. Mullings*, 223.
15. **NEW TRIAL — PREJUDICIAL ERROR IN ALLOWING INCOMPETENT QUESTIONS TO BE PUT.** — Conviction must be set aside, and a new trial granted, where in a murder case incompetent questions are asked defendant, which assume the existence of damaging facts, and are put with such persistency and show of proof as to make it evident that the questions, and not the answers, were what was considered important, and thus impress upon the minds of the jury the probability of the existence of the assumed facts upon which the questions were based, although the prisoner denies their existence, and there is no other proof. *Id.*

See **BAIL**, 1-3; **HABEAS CORPUS**, 1, 2; **NEGOTIABLE INSTRUMENTS**, 7; **STATUTES**, 5.

CROPS.

See **MORTGAGES**, 15; **VENDOR AND VENDEE**, 1, 2.

CRUELTY.

See **MARRIAGE AND DIVORCE**, 4, 7, 8.

CURTESY.

WHAT CONVEYANCE EXCLUDES. — Husband can have no estate as tenant by curtesy, when the conveyance by which title is vested in his wife declares that she is "to have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to her, to her sole support and use, free from the interference and control of her said husband, or any husband, and her heirs and assigns, to her and their only proper use and benefit forever." *Haight v. Hall*, 122.

DAMAGES.

1. **JURY IS CONFINED TO PECUNIARY DAMAGES SUSTAINED BY PARENT**, in estimating the damages, in an action brought by him to recover for the death of his child, caused by the negligence of the defendant. *Agricultural etc. Ass'n v. State*, 507.
2. **EXPECTATION OF PECUNIARY BENEFIT TO PARENT FROM CONTINUANCE OF CHILD'S LIFE BEYOND MINORITY** cannot be taken into account by the jury in an action by a parent, brought under the negligence act of Maryland, to recover damages for the death of his minor child, although the child had been emancipated by his father two years before he was killed, had voluntarily given to his father each year after his emancipation a portion of his wages, and "had said that after he had got of age he would help to fix up the property." *Id.*
3. **EXCESSIVE DAMAGES FOR PERSONAL INJURIES THROUGH NEGLIGENCE.** — A verdict for twenty-five thousand dollars for serious, though not per-

manent, personal injuries received through the negligence of a railroad company, is excessive. *Peyton v. Texas etc. R'y Co.*, 430.

4. **MEASURE OF DAMAGES FOR PERSONAL INJURIES.** — Substantial and compensatory damages should be awarded for serious, though not permanent, personal injuries received through the negligence of a railroad company, but speculative damages will not be allowed. *Id.*

See **BANKS AND BANKING**, 9; **CORPORATIONS**, 33; **EMINENT DOMAIN**, 2-5; **HUSBAND AND WIFE**, 1; **SALES**, 5, 6; **TRESPASS**.

DAMNUM ABSQUE INJURIA.

See **WATERCOURSES**, 1.

DEATH.

See **ABATEMENT**, 2.

DEBT.

See **GIFTS**, 2.

DEBTOR AND CREDITOR.

See **HOMESTEAD**, 1.

DEEDS.

1. **DELIVERY ESSENTIAL TO VALIDITY.** — Delivery, or that which is legally its equivalent, is as essential to the validity of a deed as is the signature of the grantor. *Colee v. Colee*, 345.
2. **EXECUTION INCLUDES DELIVERY.** — The finding that a deed was executed includes, as a necessary and essential incident, the delivery of the instrument. *Id.*
3. **VOLUNTARY CONVEYANCE BY WIFE — PRESUMPTION OF INTENTION.** — Where a married woman, for the purpose of putting her land beyond the reach of her husband, signs and acknowledges a deed conveying the land to her children, all of whom, with one exception, are infants, and three of whom, including the adult, assent to the conveyance, whereupon the grantor causes the deed to be recorded, and then takes it into her custody intending to retain possession of it and of the land until her death, these facts constitute *prima facie* a delivery and acceptance of the deed. *Id.*
4. **VOLUNTARY CONVEYANCE BY PARENT — PRESUMPTION OF INTENTION ARISING FROM RECORDATION.** — A voluntary conveyance, absolute in form and beneficial in effect, by a parent, to one who is not *sui juris*, and placing it upon record, although possibly not effectual, without more, as a delivery and acceptance between adults, is deemed to evince an unmistakable intention on the part of the grantor to give the deed effect, and to pass the title to the grantees. The assent of the latter, if nothing further appears, is presumed from the beneficial character of the transaction. *Id.*
5. **PRESUMPTION ARISING FROM RECORDATION.** — The fact that the grantor has possession of a deed after it has been duly recorded, where the statute makes the record admissible as original evidence of the conveyance, is not entitled to much consideration as rebutting the presumption of delivery arising in such case, especially where the grantees are minors and members of the grantor's family. *Id.*

6. **NECESSITY FOR RECORDING — WHEN TAKES EFFECT.** — All deeds or other instruments relating to or affecting the title to real property take effect only from and after recording, as to all subsequent purchasers without notice, under the Illinois statute. *Anthony v. Wheeler*, 281.
7. **UNRECORDED DEEDS — CONSTRUCTIVE NOTICE TO SUBSEQUENT PURCHASERS.** — Actual notice is not essential to give effect to a prior unrecorded conveyance. Any fact or circumstance coming to the knowledge of the subsequent purchaser which would put a prudent man on inquiry, and which, if pursued, would lead to actual notice of a prior unrecorded deed lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase; and, in such case, notice is imputed to the subsequent purchaser on account of his negligence in not prosecuting his inquiries in the direction indicated. Enough must be shown to impute bad faith to him in order to taint his purchase with fraud in law, and mere want of caution as distinguished from fraudulent and willful blindness is not sufficient to charge him with constructive notice of the unrecorded deed. *Id.*
8. **UNRECORDED ADMINISTRATOR'S DEED WHEN NOT NOTICE TO SUBSEQUENT PURCHASER.** — An unrecorded administrator's deed, in the absence of actual notice thereof, or of the proceeding under which it was obtained, is not such constructive notice as will invalidate the title of a subsequent *bona fide* purchaser. *Id.*
9. **UNRECORDED ADMINISTRATOR'S DEED — DECREE AUTHORIZING, NOT NOTICE TO SUBSEQUENT PURCHASER.** — A decree in a proceeding to sell land to pay debts in the county court, in the county where the lands are situated, is not constructive notice to a subsequent purchaser of the execution of an administrator's deed. *Id.*
10. **VESTED REMAINDER CREATED BY DEED WHEN.** — A deed conveying to the grantee a life estate, and providing that after his death the title in fee-simple shall go to and vest in the children and heirs at law of such grantee, equally, to be divided among them as tenants in common, creates a vested remainder in his children in being at the time of its execution and delivery; and since the words "children and heirs at law," as used in the deed, constitute a class, the estate in remainder will open and let in such of the same class as come into being during the continuance of the particular estate, and they likewise will take a vested remainder. *Waddell v. Waddell*, 575.
11. **WORDS "HEIRS AT LAW," IN DEED, MAY BE CONSTRUED AS BEING USED INTERCHANGEABLY WITH CHILDREN, OR AS MEANING GRANDCHILDREN OR DESCENDANTS,** where such construction is just and reasonable, accords with the evident intent of the grantor, and is consistent with the principles of law; and this is especially true under a statute which provides that the issue of a person entitled shall take the share of his ancestor. *Id.*

See CORPORATIONS, 43, 44; MUNICIPAL CORPORATIONS, 7; TRUSTS AND TRUSTEES, 2.

DEDICATION.

See MUNICIPAL CORPORATIONS, 8.

DEMAND NOTES.

See NEGOTIABLE INSTRUMENTS, 12, 13.

DEMURRER.

See TRIAL, 2.

DESCENT.

1. NEXT OF KIN. — A grandfather is one degree nearer of kin than an uncle, under the civil law. Therefore, where kindred is to be computed under that law, a grandfather will, as next of kin, take the estate of an intestate who dies without issue, wife, nor father, mother, brother, nor sister, in preference to an uncle. *Smallman v. Powell*, 742.
2. INTEREST OF CHILD IN VESTED REMAINDER DESCENDS TO HIS HEIRS. — Where a deed creates a vested remainder in the children of the grantee, the interests of any of such children as die before the termination of the life estate of their father will descend to their respective heirs. *Waddell v. Waddell*, 875.

DEVISES.

See WILLS.

DISINHERITING HEIR.

See WILLS, 7-9.

DISORDERLY HOUSE.

See CRIMINAL LAW, 9-12.

DIVORCE.

See HUSBAND AND WIFE, 3; MARRIAGE AND DIVORCE.

DOMICILE.

1. RESIDENCE of parties, within the meaning of the statute of New York requiring actions for separation between husband and wife to be commenced where they reside, is the place of their permanent abode as distinguished from their place of temporary residence. Every person must be deemed to have a domicile, and until another is acquired elsewhere, to retain the domicile of his origin. *De Meli v. De Meli*, 653.
2. RESIDENCE IS SYNONYMOUS with inhabitancy or domicile, in legal phraseology. *Id.*

DRUNKENNESS.

See CRIMINAL LAW, 4; MARRIAGE AND DIVORCE, 5, 6.

EASEMENTS.

1. RIGHT TO MAINTAIN GATE AT INTERSECTION OF PRIVATE WAY. — The owner of the fee may maintain a gate at the place where a private way intersects the public road, as a reasonable and legitimate exercise of a right which resides in the owner of the servient estate. *Phillips v. Dressler*, 375.
2. ADVERSE USER, ABANDONMENT OF. — The continuity of an adverse user to give a presumptive right to an easement, and what shall constitute such continuity, can be stated only with reference to the nature and character of the right claimed. Thus such a right to the use of a ditch to convey water for irrigation purposes is not abandoned because water does not flow in it every day in the year. If the claimant has used the

ditch at such times as he needed it, it is regarded by the law as a continuous use. *Hesperia Land etc. Co. v. Rogers*, 209.

2. **EASEMENT IN IRRIGATION DITCH BY ADVERSE USER — CONTINUITY OF USER — PRESCRIPTION.** — A claimant of an easement in an irrigation ditch, constructed by him over the land of another, may show his prescriptive right therein, by proving the use of the water running in the ditch, for irrigation purposes, every year during the cropping season, and when he needed it, for more than five years. *Id.*
4. **EASEMENT BY ADVERSE USER — TAX ASSESSMENT AS EVIDENCE.** — In an action to establish a prescriptive right to the use of an irrigation ditch over the land of another by adverse user, if it does not appear that the claimant's easement in the ditch has ever been assessed for taxes, an assessment-book showing an assessment of the land over which the ditch runs is inadmissible as against the claimant. *Id.*

EJECTMENT.

See EMINENT DOMAIN, 1, 2.

ELECTIONS.

1. **CERTIFICATE OF ELECTION MADE BY OFFICER WHO HAD NOTHING TO DO WITH ELECTION,** or with the certifying of it, does not affect the question of the validity of the election of the person to whom such unauthorized certificate is given. *Lawrence v. Ingersoll*, 870.
2. **ELECTION BY DEFINITE BODY, MAJORITY OF QUORUM NECESSARY IN.** — In an election by a definite body, as by a board of aldermen and mayor, in the absence of a statutory provision to the contrary, a majority of the body present and acting must vote for a candidate, in order to elect him; and it is not sufficient for him to receive a plurality of votes cast, or a majority, if blank ballots are excluded. Where, therefore, a board, consisting of nine aldermen and a mayor, the latter having no vote except in case of a tie, undertake to elect an officer, at a meeting at which there are eight aldermen and the mayor present, and four ballots are cast for one candidate, three for another, and one blank ballot, and the mayor declares the candidate who received the four ballots elected, whereupon a motion to reconsider is made, and four votes are cast for and four votes against the motion, and the mayor, without voting, declares the motion lost, there is no valid election. *Id.*
3. **BLANK VOTE IS NOT, TECHNICALLY, A BALLOT;** but it is, nevertheless, an act of negation, — affirmative, in showing that another voter acted, and negative, in determining the majority. *Id.*
4. **ACTION OF MAYOR IN DECLARING ELECTION CARRIED IS INEFFECTUAL,** in a board consisting of nine aldermen and the mayor, where, eight aldermen being present, four vote for one candidate, three for another, and one casts a blank ballot, because, there being no tie, the mayor had no right to vote. *Id.*
5. **ELECTION REQUIRED TO BE BY BALLOT CANNOT BE RATIFIED** by a vote not taken by ballot, nor in any case without a majority vote to ratify it. *Id.*

See MANDAMUS, 2.

ELECTRIC LIGHT COMPANY.

See MASTER AND SERVANT, 5, 6.

EMINENT DOMAIN.

1. **TAKING PRIVATE PROPERTY FOR PUBLIC USE, WHAT IS NOT.** — An improvement in a river, consisting of a dam erected by legislative authority, which causes an increased flow at times, whereby the channel is deepened and widened, and the soil somewhat worn away, is not a taking of the lands of a riparian proprietor through which the river flows, and whose soil is thus carried away. The injuries suffered by him are consequential, and he is not entitled to any redress. *Brooks v. Cedar Brook etc. Co.*, 459.
2. **DAMAGES — CONSTRUCTION OF CHARTER.** — A charter authorizing a company to build a dam, and to take certain materials therefor, "being accountable to the owners thereof for all damages, if any, to be ascertained by reference or by action on the case," does not entitle a land-owner to recover for consequential injuries resulting from the deepening and widening of the channel of the stream by the increased flow of water, and the carrying away of an increased portion of his soil. *Id.*
3. **COMPENSATION — EJECTMENT.** — Where a land-owner has consented to the entry by a corporation, and sees the expenditure of large sums of money made upon the ground in the construction of a continuous line of railroad, he cannot treat the entry as a trespass. He does not, however, lose his right to compensation, and may proceed under the statute to have his damages assessed, as well after as before the construction of the road, or he may maintain ejectment. The latter action will, however, be treated as equitable in its character, and execution will be stayed upon the judgment therein for a reasonable time, to enable the corporation to proceed and have the damages assessed as of the date of the entry. *Oliver v. Pittsburgh etc. R. R. Co.*, 814.
4. **COMPENSATION — EJECTMENT — PARTIES.** — Where the owner of land entered upon by a railroad company dies intestate, without being compensated for the land taken, his heirs, and not the administrator, are the proper parties to maintain an equitable ejectment to compel the corporation to pay the land damages, when nothing has been done in the lifetime of the intestate to work a conversion of the realty into money. *Id.*
5. **TRESPASS — DAMAGES — EVIDENCE.** — Where a corporation has entered upon the land of another, without payment of damages for the land taken, or offer of security therefor, trespass will lie for damages for the breach of the close. The subsequent tender of a bond, and proceedings for condemnation of the land, do not divest the right of action for the trespass, but the damages arising from the appropriation must be assessed in the condemnation proceedings. Hence, evidence of the market value of the land appropriated is inadmissible in the action of trespass, and if admitted, the error is not cured by an instruction that plaintiff may recover damages for the trespass only to the time of the approval of the bond, without turning the attention of the jury away from the incompetent evidence. The only damage recoverable in the action of trespass are those sustained from the breach of the close, and deprivation of use, or other injury sustained prior to the tender of the bond. *Keil v. Chartiers F. G. Co.*, 823.

See RAILROAD COMPANIES, 10.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

EQUITABLE CONVERSION.

See WILLS, 24.

EQUITY

1. EQUITY POSSESSES NO POWER TO REVISE, CONTROL, OR CORRECT THE ACTION OF PUBLIC, POLITICAL, OR EXECUTIVE OFFICERS or bodies at the suit of a private person, except as incidental to the protection of some private right, or the prevention of some private wrong, and then only when the case falls within some acknowledged and well-defined head of equity jurisprudence. *Kendall v. Frey*, 118.
 2. NEW PARTIES. — If, pending a suit in equity, the interest of the complainant in the subject-matter is sold to a third person, the latter may be permitted to come in as party complainant, and further prosecute the suit. *Symonds v. Jones*, 485.
- See CONTRACTS, 12; EXECUTIONS, 1; HUSBAND AND WIFE, 8; MUNICIPAL CORPORATIONS, 4; SET-OFF, 2; VENDOR AND VENDEE, 14.

ESTATES.

- LIFE ESTATE. — ESTATE GIVEN DURING WIDOWHOOD vests a life estate, determinable upon remarriage. *Snelling v. Lamar*, 835.
- See DEEDS, 10; HUSBAND AND WIFE, 6; TAXATION, 1; TRUSTS AND TRUSTEES, 1, 2.

ESTATES OF DECEDENTS.

See CREDITOR'S BILLS, 3; EXECUTORS AND ADMINISTRATORS; PARTITION.

ESTOPPEL.

1. IF THE OWNER OF LAND DELIBERATELY STANDS BY FOR YEARS, and without objection sees persons buying the land and making improvements thereon under the supposition that they have a good title, he becomes estopped to set up his title against such purchasers. *Marines v. Goblet*, 22.
2. ESTOPPEL FROM INSURING GOODS. — The fact that one employed to manufacture certain goods after they were completed insured them as his own, and when they were subsequently destroyed by fire, collected the amount for which they were insured, does not estop him, in an action against the person who employed him, from insisting that they were the property of such employer, nor from recovering the price agreed to be paid for their manufacture, less the amount realized from the insurance. *Central Lith. etc. Co. v. Moore*, 186.
3. MARRIED WOMAN WHO REPRESENTS TO A CREDITOR THAT ARTICLES PURCHASED or money borrowed are for the use of her separate estate will be afterwards estopped from disputing that representation, unless it appears that the creditor knew at the time he extended credit that such representation was not true. *Brown v. Thomson*, 40.
4. BURDEN OF PROOF — MARRIED WOMEN. — When it is shown that a married woman has represented, as a matter of fact, that a contract was made in reference to her separate estate, then the burden of proof shifts, and it is incumbent on her to show such facts as defeat the estoppel arising from her representation, and this she can do only by proving that the creditor knew at the time he extended credit that the articles were not purchased for that purpose. *Id.*

5. **MARRIED WOMAN** who writes to a merchant, stating that she owns property of value, which she specifies, on which a promising crop is growing, that she proposes to settle every dollar due him, and that she would charge the tenants the same as she was charged, and requesting a further credit, is estopped from proving that articles subsequently furnished her by the creditor were not for her separate estate, unless she can proceed further, and show that the creditor knew that they were not for such estate. *Id.*

See **BANKS AND BANKING**, 7; **CORPORATIONS**, 31; **INSURANCE**, 6, 25; **PARTNERSHIP**, 4.

EVIDENCE.

1. **PAROL EVIDENCE OF WARRANTY INADMISSIBLE WHEN.** — Where in an action for an alleged breach of warranty of a mortgage sold by the defendant to the plaintiff no fraud or deceit is alleged in the declaration, and the written assignment on the mortgage contains no warranty, evidence that at the time of the execution of the assignment the defendant verbally warranted the mortgage to be a good lien on the property is inadmissible. *Nally v. Long*, 547.
2. **SURVEYOR MAY, FOR PURPOSE OF REFRESHING HIS MEMORY, USE RECORD OF SURVEY** made by him, although such survey was not made in accordance with the requirements of the statute. And a copy of such record may be used for that purpose, where it is not objected to as being a copy, and not the original. *Kridler v. Mûner*, 549.
3. **JUDICIAL NOTICE.** — The courts will take judicial notice that, owing to the nature of cotton as a growing crop, and the usual methods adopted in gathering and ginning, it is peculiarly exposed to theft until it is baled. *State v. Moore*, 696.

See **ATTORNEY AND CLIENT**; **BANKS AND BANKING**, 11, 12, 25; **CONTRACTS**, 3, 4; **CRIMINAL LAW**, 5, 6, 10, 12, 13; **EASEMENTS**, 4; **EMINENT DOMAIN**, 5; **HUSBAND AND WIFE**, 4; **MORTGAGES**, 8; **MARRIAGE AND DIVORCE**, 2; **NEGLIGENCE**, 1, 17; **PHYSICIANS AND SURGEONS**, 3-6; **WITNESSES**, 4; **WILLS**, 11-14.

EXCESSIVE DAMAGES.

See **DAMAGES**, 3.

EXECUTED CONTRACTS.

See **LANDLORD AND TENANT**, 4.

EXECUTIONS.

1. **WHAT EQUITIES NOT SUBJECT TO.** — If lands are purchased and paid for by a debtor, who, for the purpose of defrauding his creditors, takes the title in the name of another, the debtor has no interest in such land subject to execution sale. The remedy of his creditors is by an action in the nature of a bill in equity to subject such lands to the payment of their debts. *Everett v. Ruby*, 685.
2. **CHATELS MORTGAGED, WHEN NOT SUBJECT TO.** — Chattels in the possession of a mortgagor after condition broken are not subject to judgment levy and sale by his creditors, and where, after levy in such case, the property is subsequently seized by the sheriff, acting as the agent of the mortgagee, and sold for more than enough to satisfy the mortgage,

the judgment creditor is not entitled to the surplus arising from the sale. The title to the proceeds of the sale is in the mortgagee, subject to an accounting with the mortgagor. *Ex parte Lorea*, 862.

3. PARTNERS are not entitled to have any of the partnership property set aside as exempt from execution. *Thurlow v. Warren*, 472.

EXECUTORS AND ADMINISTRATORS.

1. GIFT TO WIDOW PERSONALLY NOT CHARGEABLE AGAINST HER AS EXECUTRIX. — A gift to a widow personally by the employer of her deceased husband of an amount equal to his salary for two months, if he had lived, cannot be charged against her as executrix and as part of the husband's estate, when the intent of the donor to make the gift to her alone is clear and without doubt. It is immaterial that she did not know whether it was a gift to her or not. *Estate of Stevens*, 252.
2. ALLOWANCE FOR SUPPORT OF WIDOW. — The widow of a decedent is entitled to a reasonable allowance for her support. The court, in making this allowance, should take into consideration all the circumstances bearing upon the reasonableness of the amount allowed, regard being had to the mode in which she lived during the lifetime of her husband, and the sufficiency of the estate to pay the amount allowed. The court is not bound to limit such amount to a bare support of the widow. *Id.*
3. PROFITS OF RENTED HOUSE NOT CHARGEABLE AGAINST EXECUTRIX. — The widow of a decedent is not chargeable as executrix with profits received from renting rooms in a house rented by her, the rental of which is paid out of her monthly allowance, when the court, in making such allowance, considered evidence to the effect that the rental of such house, as paid by the executrix, was the same in amount as that paid by her husband during his lifetime. *Id.*
4. ALLOWANCE FOR SUPPORT OF WIDOW — POWER OF COURT GRANTING, TO REVIEW — When the court has granted an order making an allowance for the support of a widow of a decedent, and the time in which an appeal from such order may be taken has been allowed to pass, the court cannot review the order. Its power over it is at an end, though it may be that if the court was imposed upon by a studied withholding of facts bearing upon the subject-matter of inquiry, it may so change the order as to make it conformable to what would have been a fair determination on the facts withheld being made to appear. *Id.*

See DEEDS, 8, 9.

EXEMPLARY DAMAGES.

See TRESPASS.

EXEMPTIONS.

1. EXEMPTION LAWS HAVE NO EXTRATERRITORIAL EFFECT, but are restricted in their operation to the states in which they are enacted. *Carson v. Railway Co.*, 921.
2. RESIDENT OF TENNESSEE SUED IN ANOTHER STATE CANNOT OBTAIN BENEFIT OF EXEMPTION secured to him by the Tennessee statutes, nor can his garnished debtor, in such case, obtain it for him, and he is under no obligation to endeavor to do so. *Id.*

See EXECUTIONS; HOMESTEAD.

EXPERT TESTIMONY.

See BANKS AND BANKING, 26; WITNESSES, 2-4.

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FIXTURES.

BUILDINGS PLACED ON LAND BY ONE IN POSSESSION THEREOF UNDER A CONTRACT OF PURCHASE become a part of the realty, in the absence of any agreement to the contrary made with the owner of the land, and the latter is entitled to recover them from one who took a chattel mortgage thereof from the person so in possession, with full notice of all the circumstances. *Kingsley v. McFarland*, 473.

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See NEGOTIABLE INSTRUMENTS, 11.

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See BANKS AND BANKING, 10, 11; NEGOTIABLE INSTRUMENTS, 4.

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GIFTS.

1. TO CONSTITUTE VALID GIFT BETWEEN LIVING PARTIES, THERE MUST BE DELIVERY of the subject-matter of the gift with the intent on the part of the donor to transfer the right of property to the donee or to some one for his use; the donor must renounce and the donee must acquire the title and interest in the property given. An entry, therefore, made by a husband in a pass-book of a savings bank, to the effect that, in consideration for the love and affection for his wife, he gave her all the money credited or to be credited to him in the book, where, after the making of such entry, he continued to make deposits and to draw from the fund, from time to time, as he saw fit, does not constitute a valid gift to the wife of the money on deposit. Nor does it operate as a testamentary disposition thereof, because it is not executed as the law requires. *Dougherty v. Moore*, 524.
 2. GIFT OF A DEBT. — A debt may be forgiven, and a receipt in full may be evidence of such forgiveness. *McKensie v. Harrison*, 638.
 3. DONEE OF GIFT MAY REGULATE ITS DISPOSAL, and designate the donee. *Estate of Stevens*, 252.
- See EXECUTORS AND ADMINISTRATORS, 1; LANDLORD AND TENANT, 4.

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See SURETYSHIP.

HABEAS CORPUS.

1. JUDGMENT SENTENCING A PRISONER FOR A LONGER TIME THAN STATUTE WARRANTS is erroneous, but not void, and he is not entitled to be discharged on *habeas corpus*. *In re Graham*, 174.
2. ON HABEAS CORPUS, ONLY JURISDICTIONAL DEFECTS are available, and not mere errors of the court. Hence one who, after conviction, was sentenced for a longer period than the law warrants will not be released upon *habeas corpus*. *Id.*

See MARRIAGE AND DIVORCE, 11.

HIGHWAYS.

See RAILROAD COMPANIES, 7; WATERCOURSES, 4, 5.

HOMESTEAD.

1. **DEBTOR MAY ACQUIRE, BY MARRYING, WHEN.** — A debtor who owned lands at the time when he contracted the debt may subsequently acquire a homestead right therein, by reason of his marriage, if his creditor had no fixed lien thereon at the date of the marriage. The law which allows the debtor to acquire a homestead right in such case impairs no legal right of his creditor. *Dye v. Cooke*, 882.
2. **HEAD OF FAMILY.** — It is not necessary that the relation of husband and wife, or of parent and child, should exist, in order to constitute a family having a head, within the meaning of the homestead law. The exemption extends to one who has residing with him those so connected with him by blood, or ties of residence and association, as to become part of his household, and who have no residence but that which they enjoy under his favor, and whom he is under a legal or moral duty to support. *Moyer v. Drummond*, 850.
3. **HEAD OF FAMILY.** — A brother who resides with his sister in her house, the rental value of which is insufficient to support her, and who supports her and manages the household, is the head of a family, and entitled to the chattel exemption allowed by the homestead law. *Id.*
4. **INTEREST IN PARTNERSHIP EXEMPT.** — A partner is entitled to the chattel exemption allowed by the homestead law in partnership assets, as against his individual creditors. *Id.*
5. **EXEMPTION OUT OF PARTNERSHIP ASSETS.** — Partners are not entitled to a homestead exemption out of partnership assets until the partnership debts are paid. If, after this, either partner has an individual interest remaining, he is entitled to a homestead exemption therein as against his individual creditors. *Ex parte Karish*, 865.

See COSTS, 1.

HOMICIDE.

See CRIMINAL LAW, 14, 15.

HUSBAND AND WIFE.

1. **PENALTY, WHEN NOT LIQUIDATED DAMAGES.** — An agreement for the separation of a husband and wife, and that he will pay a specified amount to her monthly, and binding himself to make such payment under a penalty of five thousand dollars, which sum shall be considered a forfeiture to her, may be declared upon as a penal bond, and the five thousand dollars are a penalty, and not liquidated damages. *Carey v. Mackey*, 500.
2. **AGREEMENT FOR SEPARATION.** — A bond for the payment by a husband of a monthly allowance to his wife, in view of their separation, is valid. *Id.*
3. **DIVORCE. — AGREEMENT FOR SEPARATION OF HUSBAND AND WIFE,** and that he will pay her a monthly allowance for her support, is not abrogated by their subsequent divorce. *Id.*
4. **CONVERSATIONS BETWEEN HUSBAND AND WIFE ADMISSIBLE IN EVIDENCE WHEN.** — In a suit to enjoin the sale of a wife's real estate under a deed of trust given to secure the payment of certain notes made by her husband in a sale to him of property induced by fraud, both the husband

and the wife may testify in relation to conversations between themselves as to the transaction, as a part of the *res gesta*, and also on the ground of fraud. Such testimony is, under the circumstances, admissible *ex necessitate rei*. A fraud-feasor who uses the husband as a mere conduit through which to induce the wife to sign and acknowledge the deed of trust by which the desired and designed end is to be accomplished cannot be permitted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed. *Henry v. Sneed*, 580.

8. INNOCENT PURCHASER AS TO HUSBAND NOT SO AS TO WIFE WHEN.—Where notes of a husband procured through fraud are secured by a recorded deed of trust on his wife's land, knowledge by the indorsee of such notes that the husband had executed a compromise of his claim of fraud will not make the indorsee an innocent purchaser as to the wife. *Id.*
9. WIFE NOT ESTOPPED BY ACT OF HER HUSBAND WHEN.—A married woman seized of an estate in the ordinary way, and not as a separate estate, is incapable of being estopped by an act of her husband in which she did not join, even though she be a surety for him. *Id.*
7. MERE RELATION OF HUSBAND AND WIFE CREATES NO AGENCY IN HIM to bind her by his representations, in the absence of proof that she is seized of a separate estate. *Id.*
8. WIFE WHO IS SURETY FOR HER HUSBAND MAY INVOKE EQUITABLE INTERVENTION in her behalf against fraud especially directed against her property, even when he is in no position to ask for a like relief. *Id.*
9. AGENCY.—THE HUSBAND OF A MARRIED WOMAN MAY BE BY HER CONSTITUTED her agent for the management of her separate estate, and if he, being such agent, purchases articles for her or for her separate estate, or supplies for her tenants thereon, she is liable therefor. *Brown v. Thomson*, 40.
10. WHETHER A HUSBAND HAS BEEN BY HIS WIFE CONSTITUTED HER AGENT TO MANAGE HER SEPARATE ESTATE, and whether purchases made by him were for the purposes specified, are questions of fact for the jury, and must be left to their decision. *Id.*
11. WIFE'S UNITING WITH HUSBAND IN MORTGAGE CREATES NO EQUITY IN HER FAVOR as against the rights of a creditor in making application of payments. She stands in no better position than a surety, who has no right to control, for his benefit, an appropriation of payments, when such appropriation is to be made by the court. Nor is the question affected by the fact some of the payments were made with proceeds of the sale of tobacco grown and wood cut on property belonging to the wife, where the tobacco was grown and the wood was cut by the husband with the consent of the wife, and the proceeds of the sale were used and applied by him with her consent, and without any knowledge on the part of the creditor as to the sources from which the money was derived. *Frazier v. Lanahan*, 516.
12. WITNESSES—WIFE'S RIGHT TO TESTIFY IN HER OWN BEHALF, AND AGAINST HER HUSBAND.—Though the statute declares that a husband or wife is not competent to testify against the other upon the trial of an action founded upon an allegation of adultery, except to prove the marriage, a wife who brings an action against her husband, based partly upon his cruelty in circulating against her unfounded charges of marital infidelity, is not precluded from testifying to the falseness of such

charges by the fact that the husband files a counterclaim in the same action, in which he makes the same charges against her, and seeks affirmative relief therefor. Her right to so testify exists, though the court ultimately decided that the husband, at the time of circulating the charges, acted upon information he believed to be true, and thus relieves him of the imputation of maliciously making them. *De Meli v. De Meli*, 652.

12. **CONFIDENTIAL COMMUNICATION BETWEEN HUSBAND AND WIFE.** — THE ADDRESSES ON ENVELOPES AND IN LETTERS WHICH THE HUSBAND HAS WRITTEN AND MAILED to his wife cannot be admitted in evidence against him to show that he committed perjury in swearing that he did not know her place of residence. Every part of such letters, including the envelopes and addresses, must be treated as confidential communications from the husband to the wife. *Selden v. State*, 144.
14. **A WIFE WHOSE HUSBAND IS DEBAUCHED AND CRIMINALLY KNOWN BY ANOTHER WOMAN** cannot maintain an action against the latter to recover damages therefor. *Doe v. Roe*, 499.
- See ADVERSE POSSESSION, 1; ATTORNEY AND CLIENT; CONTRACTS, 2; CRIMINAL LAW, 5; CURTESY; DEEDS, 3; DOMICILE, 1; EXECUTORS AND ADMINISTRATORS, 1-4; GIFTS, 1; MARRIAGE AND DIVORCE.

IMPROVEMENTS.

See ESTOPPEL, 1.

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, 21-25.

INDICTMENT.

See CRIMINAL LAW, 1, 2.

INDORSER.

See NEGOTIABLE INSTRUMENTS, 4, 5, 7, 10, 12.

INFANT EMPLOYEES.

See MASTER AND SERVANT.

INJUNCTIONS.

INJUNCTION NOT MANDATORY WHEN. — An injunction which prohibits the parties enjoined from meeting and acting as a board of education, without giving the complainant notice, and permitting him to act with them, is not mandatory. *Lawrence v. Ingersoll*, 870.

See CONTRACTS, 11; RAILROAD COMPANIES, 7.

INSANE PERSONS.

1. **INSANE PERSONS, SALES AND CONVEYANCES BY.** — A purchaser for value of real property, in the absence of notice to the contrary, may act on the presumption that all the grantors of the property whose deeds appear of record in due form were of sound mind when such deeds were executed, and none of such grantors can afterwards defeat such deeds by proving their mental incompetency at the time they were executed. *Odom v. Riddick*, 686.

2. **DEED OF A LUNATIC NOT UNDER GUARDIANSHIP** is not void, and cannot be avoided as against an innocent purchaser for value in good faith, and without any knowledge of the incapacity of the grantor. *Id.*
3. **DEED OF A LUNATIC WILL NOT BE SET ASIDE, EVEN THOUGH THE GRANTEE THEREIN KNEW OF THE GRANTOR'S MENTAL INCAPACITY**, if no fraud was practiced on the latter, nor undue influence exercised over him, and the deed was made under the advice of his counsel, for a full and fair consideration, and the transaction was for the advantage of the grantor and his family. *Id.*

INSTRUCTIONS.

See **APPEAL AND ERROR**, 5, 6; **CRIMINAL LAW**, 3; **MARRIAGE AND DIVORCE**, 3; **MASTER AND SERVANT**, 13, 15; **TRIAL**, 2, 4

INSURANCE.

1. **FORFEITURE FOR FALSE SWEARING.** — Though the actual loss, truly stated in the proof of losses, exceeded the whole amount of the insurance, a knowingly and purposely false statement, under oath, of other pretended losses, will destroy plaintiff's claim for his actual loss, under a policy containing a stipulation that "any fraud, or attempted fraud, or false swearing on the part of the assured shall cause the forfeiture of all claims under this policy." *Dolloff v. Phoenix Ins. Co.*, 482.
2. **FRAUD IN ANY PART OF A FORMAL STATEMENT OF LOSSES** taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he has destroyed his actual claim by his false swearing. *Id.*
3. **CONSTRUCTION OF STATUTE.** — A statute enacting that immaterial and innocent misstatements shall not avoid a policy of insurance refers to statements made in procuring the policy, and does not relieve the assured from a forfeiture incurred by his knowingly making a false statement, under oath, in his proofs of loss. *Id.*
4. **WAIVER OF CONDITION AS TO PREPAYMENT OF PREMIUM.** — An express provision in a policy of insurance that the company shall not be liable thereon until the premium is actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium, and in such case the company is liable for a loss which may occur during the period of the credit. *Farnum v. Phoenix Ins. Co.*, 233.
5. **WAIVER BY AGENT OF PAYMENT OF PREMIUM.** — A LOCAL INSURANCE AGENT who has power to extend credit upon the premium, and who represents the full power of the company to make binding contracts of insurance by countersigning and delivering policies, and who countersigns and delivers a policy unconditionally as a completed contract, under a specific agreement for the payment of the premium at a future date, thereby waives, to the full extent to which the company could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. *Id.*
6. **ACKNOWLEDGMENT OF RECEIPT OF PREMIUM AS ESTOPPEL AGAINST COMPANY.** — Where an insurance policy contains a formal receipt of the premium, its unconditional delivery is conclusive evidence of payment so as to estop the company from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid. The same result follows where the policy is

delivered as a valid and completed contract upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent or substitute for a cash payment, there also being a promise to pay the premium in future in consideration of the contract to insure. *Id.*

7. **REMEDY FOR UNAUTHORIZED TERM OF CREDIT ON PREMIUM.** — The giving of any credit on the payment of premium by an authorized agent of the company is a waiver of actual payment as a condition precedent to its liability; and the only remedy of the company, after the term of credit has expired, is to rescind or cancel the policy for non-payment within the term upon personal notice to the insured. *Id.*
8. **CANCELLATION OF POLICY FOR NON-PAYMENT OF PREMIUM — NOTICE.** — When credit is given by an insurance company for the payment of the premium, it has no right to cancel the policy for non-payment, except by putting the insured in default and giving him personal notice. If such notice is sent by mail, and not received, the cancellation for such non-payment is ineffective. Notice of cancellation to the agent who negotiated the policy will not bind the assured, nor will notice to any one other than the person obligated to pay the premium. *Id.*
9. **POWER OF AGENT TO WAIVE CONDITIONS IN POLICY.** — A local insurance agent, clothed with authority to receive proposals for insurance and to countersign and deliver policies within his territory, is presumed to have the power of the company, within such territory, to waive the immediate payment of premiums, and to make contracts for credit. *Id.*
10. **GENERAL AGENT, WHO IS, HAVING POWER TO WAIVE CASH PAYMENT OF PREMIUM.** — An insurance agent who, under general instruction from the home office, has authority, within certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payments of premiums. His powers cannot be limited by instructions not communicated to the insured. *Id.*
11. **COMPANY BOUND BY ACTS OF AGENT IN EXCESS OF HIS AUTHORITY.** — Where, by the terms of an insurance policy, a particular insurance agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of any limitation of his power, though he may have exceeded his authority and violated his duty to his principal. *Id.*
12. **COMPANY BOUND BY ACTS OF LOCAL AGENT IN EXCESS OF AUTHORITY.** — A local insurance agent, having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds the company by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess thereof. *Id.*
13. **CREDIT FOR PREMIUM — TENDER OF PREMIUM AFTER LOSS.** — A tender of payment of the premium on a policy of insurance, though made after loss, but within the term for which credit has been given, is a sufficient compliance with a condition that payment is a condition precedent to recovery. The company cannot refuse such tender, and then successfully insist upon a nonsuit because the premium was not actually paid. *Id.*
14. **WAIVER OF CONDITIONS PRECEDENT BY AGENT.** — The insured is not bound to take notice of conditions in the policy, that the premium must

be actually paid, nor that the waiver of condition must be indorsed in writing on the policy, when it is executed and delivered to him as a valid and completed contract by an agent having authority to countersign it, and who, before or at the time of the delivery of it, has given the insured a credit upon the premium by parol. If a loss occurs, in such case, before the credit expires, the company is bound, notwithstanding the agreement for credit was not indorsed upon the policy. The limitation upon the power of the agent to waive such condition applies only after the policy has been delivered as an executed contract. *Id.*

15. **WAIVER OF CONDITIONS PRECEDENT BY AGENT — KNOWLEDGE OF AGENT IN KNOWLEDGE OF COMPANY.** — Where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy of insurance is fully known to its agent, local or general, who is authorized to consummate the contract of insurance, the agent's knowledge is the knowledge of the company, and his act in executing the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by it of such condition precedent, and of the general requirement that waivers of conditions expressed in the policy shall be in writing indorsed thereon. *Id.*
16. **CONTRACTS LIMITING WAIVER OF CONDITIONS — POWER OF AGENTS TO WAIVE.** — An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver, not forbidden by the statute of frauds; and whether the agent had the power to make such contract or to waive the condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. *Id.*
17. **WAIVER OF CONDITIONS BY AGENT.** — A local insurance agent, clothed with general power to solicit and consummate contracts of insurance, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent, by indorsement in writing on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of the delivery of the policy was not indorsed upon it. *Id.*
18. **WAIVER OF CONDITION AS TO ARBITRATION OF LOSS.** — Where a fire insurance policy provides for arbitration of the amount of loss on failure of the parties to agree thereon, no arbitration is contemplated or required except in that event; and if, after loss, the requisite proofs of the amount are furnished the company, and it does not object to such amount of loss, or the proofs thereof, but denies its liability on the ground that the policy does not exist, and was canceled before loss, this is sufficient evidence that the company acquiesced in the amount of loss claimed, and thereby waived its right to have it determined by arbitration. *Id.*
19. **INSURANCE ON ARTICLES CONTAINED IN A CERTAIN LIVERY-STABLE,** such as harness and carriages, which the insurer knows are kept in constant use, and therefore often in need of repairs, remains in force while such articles are temporarily absent from the stable for the purpose of being repaired, and if they are destroyed by fire during such absence, a recovery may be had for the loss thereby sustained. *Niagara F. Ins. Co. v. Elliott*, 115.

20. **INSURER'S RIGHT TO SUBROGATION.** — Insurer who has paid a loss to a mortgagee is not entitled to be subrogated to the mortgage debt while any part of it remains unpaid. In other words, the insurer is not entitled to subrogation, if any part of the debt is unpaid, unless he tenders to the mortgagee the balance due. *Phenix Ins. Co. v. First Nat. Bank*, 101.
21. **MUTUAL BENEFIT ASSOCIATION — CONSTRUCTION OF FORFEITURE CLAUSE IN CERTIFICATE OF MEMBERSHIP.** — A clause in a certificate of membership in a mutual benefit association, that a notice of assessment shall be sent to each member by mail, "and if the assessment is not received within thirty days from the mailing of said notice, it shall be accepted and taken as sufficient evidence that the party has determined to terminate his connection with the association, which connection shall thereupon terminate, and the party's contract with the association shall lapse and be void; but said party may again renew his connection by a new contract made in the same manner as the first; and for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated, by paying assessment arrearages," — does not vest in the officers of the association an arbitrary power to determine what shall be a valid excuse, but imposes on them the duty of accepting an excuse if valid; and if the excuse for not complying with the notice is, that the member, within the time allowed him in which to make payment, was stricken with apoplexy, and thereby rendered unconscious, in which condition he remained until his death, such excuse must be regarded as valid and sufficient, and the beneficiary under the certificate has the right, after the death of the member, to tender payment of the delinquent assessment, and insist on his reinstatement. *Dennis v. Massachusetts B. Ass'n*, 660.
22. **RIGHT OF AN INSURED TO BE REINSTATED DOES NOT DIE WITH HIM,** but passes to the beneficiary under the policy. *Id.*
23. **STATEMENT IN APPLICATION FOR INSURANCE IN BENEFICIAL SOCIETY, WHAT MATERIAL.** — Where one of the objects of a beneficial corporation, chartered under a statute authorizing it to pay to the widows, orphans, relatives, or dependents of a deceased beneficial member a sum of money, is to establish a benefit fund out of which is to be paid to the family, orphans, or dependents of a deceased beneficial member a certain sum of money, a statement in an application for membership and insurance in such society which describes the beneficiary as the niece of the applicant is material; and if it be shown that there was no kinship between them, such false statement in the application will defeat an action to recover the payment of the insurance money, it being provided in a subsequent clause of the application that any false statement therein should forfeit all rights of the applicant or of his beneficiaries. *Supreme Council v. Green*, 527.
24. **AGREEMENT TO AOT TOWARDS EACH OTHER AS UNCLE AND NIECE** cannot have the effect to make the parties thereto uncle and niece within the meaning of a statute authorizing benefits to be paid to the "relatives" of a deceased member of a beneficial corporation. *Id.*
25. **BENEFICIAL CORPORATION IS NOT ESTOPPED TO DENY TRUTH OF STATEMENT** contained in an application for membership and insurance therein by the hearsay information of one of its officers, who was in no way charged with the duty of ascertaining the truth or falsity of such statement. *Id.*

26. **INSURANCE AGAINST ACCIDENT — PRESUMPTION OF CAUSE OF INJURY.** — Upon proof being made to the effect that the decedent, who was insured against death by accident, appeared at his home with marks of extreme violence visible upon his back, which seemed to have been inflicted recently, and from which he subsequently died, the presumption should be indulged that such injuries were not self-inflicted, nor caused by the negligence of the insured, but were the result of accident. *Crambide v. Travelers Ins. Co.*, 184.
27. **BURDEN OF PROOF.** — If it appears that the assured died from injuries received by him, the insurer must assume the burden of proving that such injuries resulted from some cause against which he did not insure, or that there had been some breach of some condition or agreement in the policy on account of which he is relieved from liability. *Id.*

INTERVENTION.

INTERVENTION TO PROTECT ATTACHMENT LIENS. — When goods have been sold under an execution, one who claims to have an attachment lien paramount to such execution need not resort to an independent action to enforce his lien, but may intervene in the action in which the execution issued, have his lien adjudged to be paramount, and a judgment therein entered directing the proceeds of the sale to be paid towards its satisfaction. *Towers v. Large*, 195.

See ESTOPPEL, 2.

INTEREST.

See BANKS AND BANKING, 21; MORTGAGES, 10; MUNICIPAL CORPORATIONS, 1-3.

IRRIGATION.

See EASEMENT, 2-4.

JUDGMENTS AND DECREES.

1. **DECREE OF DIVORCE GRANTED IN A FOREIGN COUNTRY, IN WHICH DEFENDANT DID NOT RESIDE**, in an action to which he did not appear, and in which process was not personally served upon him within such country, is void. *De Meli v. De Meli*, 653.
2. **JUDGMENT VOID BECAUSE OF LOSS OF JURISDICTION THROUGH THE DISCHARGE OF CAUSE OF ACTION PENDENTE LITE.** — If an action is brought to foreclose tax certificates or other liens, and the plaintiff, during the pendency of the suit, accepts full payment of his lien, his cause of action is thereby terminated, and with it the jurisdiction of the court over the action, and the judgment subsequently entered for costs is void, and a sale made to satisfy it has no valid support, and is therefore ineffectual for any purpose. *Two Rivers Mfg. Co. v. Beyer*, 131.
3. **RESTITUTION OF POSSESSION OF LAND UNDER REVERSED JUDGMENT.** — Where a party has been wrongfully dispossessed of land by order of a superior court, which upon appeal is reversed, and restitution of possession directed, such restitution cannot be prevented by a third person, who has gained peaceable possession under title derived from an independent source, and adverse to both parties to the suit, and who is not in collusion with either. *Quan Wo Chung Co. v. Laumeister*, 261.

4. **RESTITUTION OF POSSESSION — WRONGFUL DISPOSSESSION BY AGENCY OF COURT.** — The rule that plaintiff in an action to recover the possession of land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding, holding possession under an independent title or claim of title, and not in collusion with defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of a court. *Id.*
5. **REVERSAL OF JUDGMENT, EFFECT OF, ON RIGHTS OF PURCHASER AT SALE.** — Where the purchaser at a judicial sale is either a party or a privy to the suit in which the sale is ordered, his title will be defeated by a reversal of the judgment or decree, upon writ of error sued out after the making of the sale. And a maker of a general assignment for the benefit of creditors is a privy to a suit brought by his assignee to recover assets. *Welcker v. Staples*, 869.
See **BANKRUPTCY**; **COSTS**, 4; **PAYMENT**, 6; **PROCESS**; **SET-OFF**, 1-3.

JUDICIAL NOTICE.

See **EVIDENCE**, 3.

JUDICIAL SALES.

1. **MERE INADEQUACY OF PRICE** or consideration of a previous sale cannot affect the title of a subsequent *bona fide* purchaser, and is no evidence of any other fraud. *Two Rivers Mfg. Co. v. Beyer*, 131.
2. **A PROCEEDING TO SET ASIDE OR RESCIND THE CONFIRMATION OF A JUDICIAL SALE** cannot be by summary rule to show cause, but should be by formal petition filed in the case setting forth the grounds upon which the application is based. *Virginia etc. Ins. Co. v. Cottrell*, 108.
3. **BEFORE THE CONFIRMATION OF A JUDICIAL SALE** the proceeding is *in fieri*, and the bidder is not a purchaser, but after such confirmation the contract is complete. The bidder thereby becomes a purchaser, and, as such, the owner of the equitable title subject to a lien upon the property, for the purchase-money, and may be compelled by process of the court to comply with the contract. *Id.*
4. **AFTER CONFIRMATION OF A JUDICIAL SALE**, it cannot be rescinded except upon some special ground, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person connected with the sale, which has worked an injustice to the party complaining. *Id.*
5. **JUDICIAL SALE WILL NOT BE VACATED AFTER CONFIRMATION BECAUSE A VALUABLE MINE HAS BEEN DISCOVERED** adjacent to the premises since the sale, whereby their market value is increased, though the purchase-money has not been paid, if there was no fraud in concealing the existence of the mine before the order of confirmation was entered. *Id.*
6. **PROBATE SALES.** — **IF ON A PROPER PETITION** a probate judge orders real estates to be sold, persons who were parties to the proceeding, and duly served with process, cannot avoid a sale made thereafter, on the ground that, as appears by the result of the sales made, it was not necessary to sell all the property to pay the debts, for the payment of which the sale was ordered to be made. *Hodge v. Fabian*, 25.
7. **COLLATERAL ATTACK ON AN ORDER OF THE PROBATE JUDGE DIRECTING A SALE** cannot be successfully made when he had jurisdiction of the subject-matter and of the parties. Jurisdiction over the subject-matter attaches on the filing of a petition sufficient in form. *Id.*

See **INTERVENTION**; **JUDGMENTS AND DECREES**, 3-5.

JURISDICTION.

1. A COURT HAS NO EXTRATERRITORIAL JURISDICTION, AND A PERSON NOT DOMICILED in a state or country cannot be charged *in personam* by adjudication there, unless he is personally served with notice or process within it, or voluntarily submits himself to the jurisdiction of its courts by appearing in some manner in the action or proceeding sought to be instituted against him. *De Meli v. De Meli*, 652.
2. CONFLICT OF JURISDICTION — ORDER OF SUPREME COURT CONTROLS — The execution of an order of restitution of possession of land issued upon appeal cannot be enjoined by the superior court. The order of the supreme court must control, and any conflicting order from the superior court must be disregarded. *Quan Wo Chung Co. v. Laumeister*, 261.
3. LOSS OF JURISDICTION MAY OCCUR DURING THE PENDENCY OF AN ACTION over which the court had jurisdiction when it was commenced; and if jurisdiction is so lost, any further action of the court is a nullity. *Two Rivers Mfg. Co. v. Beyer*, 131.
4. JURISDICTION IS TERMINATED WHEN THE CAUSE OF ACTION IS WITHDRAWN OR EXTINGUISHED. — The extinguishment of the cause of action is an extinguishment of the subject-matter of the suit, and leaves the court without anything over which it has jurisdiction. *Id.*

See JUDGMENTS AND DECREES, 1, 2; JUDICIAL SALES, 7.

JURY AND JURORS.

See CRIMINAL LAW, 4.

KILLING STOCK.

See RAILROAD COMPANIES, 2.

LANDLORD AND TENANT.

1. LANDLORD IS UNDER NO DUTY TO REPAIR LEASED PREMISES unless he has covenanted to do so, and his promise to make repairs thereon is without consideration, and no action can be sustained because of his non-performance. *Gregor v. Cady*, 466.
2. NEGLIGENCE — LANDLORD UNDERTAKING TO REPAIR LEASED PREMISES AT THE REQUEST OF HIS TENANT, when under no obligation so to do, and who assures his tenant that such repairs have been made, is answerable to the tenant, if the latter, relying on such assurance, suffers injury by reason of the defects not being properly repaired. *Id.*
3. FOR NEGLIGENCE IN THE PERFORMANCE OF A GRATUITOUS UNDERTAKING, through which damages ensue to the other party, an action lies. *Id.*
4. EXECUTED AGREEMENT TO REDUCE RENT. — If the lessor orally agrees to reduce the rent of leased premises, and to accept a less sum than stipulated for in the lease thereof under seal, and such agreement is carried out for a number of years by the payment by the tenant and the acceptance by the lessor of such rent as reduced, and the giving of the receipts therefor as in full of all rent to the date of said receipts, the lessor must be regarded as having made a valid gift to the tenant of the difference between the rent paid and that stipulated for in the lease, and cannot recover of the latter the amount so given him. *McKense v. Harrison*, 638.
5. LEASE FOR MORE THAN A YEAR — STATUTE OF FRAUDS. — ORAL AGREEMENT between two persons that one of them shall take a lease of prop-

erty for five years, and that both shall occupy it during such term, and each shall pay one half of the rent, is void by the statute of frauds; and if the one who agrees to take such lease does so, and becomes liable for rents for the full period specified therein, he nevertheless can recover from the other only for such time as he actually shares in the occupancy of the leased premises. *Talamo v. Spitzmiller*, 607.

6. IF A LEASE IS VOID UNDER THE STATUTE OF FRAUDS BECAUSE FOR MORE THAN ONE YEAR, and not in writing, but possession is taken thereunder, no yearly tenancy is thereby created, and the tenant, on abandoning possession, is not thereafter answerable for rents. *Id.*
7. LEASE. — PAROL AGREEMENT FOR A TERM OF YEARS IS NOT EFFECTUAL TO CREATE A TENANCY FOR ONE YEAR; but if the tenant takes possession, a tenancy for a year may be inferred, if there is anything to show that such tenancy is within the intent of the parties, as where there is a payment and receipt of an installment or aliquot part of an annual rent. *Id.*
8. PAROL LEASE FOR MORE THAN ONE YEAR IS NOT EFFECTUAL TO VEST ANY TERM WHATEVER in the lessee, and when he comes into possession under it with the consent of the lessor, without any further agreement, he is a tenant at will merely, subject to liability to pay at the rate of the stipulated rent as for use and occupation. This tenancy at will can be converted into a yearly tenancy only by a new contract, which, however, may be inferred from circumstances, when they permit it. *Id.*
9. STATUTE OF FRAUDS — ORAL LEASE FOR MORE THAN A YEAR — PART PERFORMANCE — SPECIFIC PERFORMANCE. — A parol agreement for a lease of lands for more than a year is void; but if the tenant has entered into possession, paid rent, incurred expenses in improvements, and changed his circumstances and condition, relying upon the oral agreement, to such an extent that a refusal on the part of the landlord to perform operates as a fraud on the tenant, there is such part performance as will take the case out of the statute of frauds, and authorize the court to decree specific performance of the parol agreement. *Wallace v. Scoggins*, 749.
10. STATUTE OF FRAUDS — PAROL LEASE FOR MORE THAN A YEAR — SPECIFIC PERFORMANCE. — A parol agreement for a lease of lands for more than a year is such an agreement that its part performance takes it out of the operation of the statute of frauds and renders it enforceable by decree of specific performance in equity. *Id.*

LARCENY.

See CRIMINAL LAW, 1.

LEASE.

See LANDLORD AND TENANT, 5-10.

LIENS.

See CREDITORS' BILLS, 1-3; INTERVENTION; JUDGMENTS AND DECREES, 2; MORTGAGES, 15; PARTNERSHIP, 1; SALES, 3, 4; SURETYSHIP, 4; VENDOR AND VENDEE, 13, 14, 15.

LIFE ESTATE.

See ESTATES.

LIMITATIONS OF ACTIONS.

1. **ABSENCE FROM STATE, EFFECT OF.** — Absence of a party from the state stops the running of the statute of limitations as to causes of action against him; but his absence does not stop the running of the statute as to any cause of action in his favor. *Stone v. Hammell*, 272.
2. **AGAINST SHERIFF'S DEED.** — If a judgment debtor sells land which is then subject to a judgment lien, and his vendee enters into possession thereof, and holds the same, claiming title thereto, and a sale is subsequently made, and a sheriff's deed executed, in the enforcement of such judgment, the statute of limitations commences to run in favor of the purchaser from the judgment debtor at the date of his entry into possession, and not from the date of the execution of the sheriff's deed. And if the time between such entry into possession and the commencement of the action is greater than that allowed by the statute of limitations for the bringing of actions to recover real property adversely held, then the plea of the statute of limitations must be sustained, and the right of the purchaser at the sheriff's sale to recover the property denied. *Garvin v. Garvin*, 48.

See ADVERSE POSSESSION.

LIS PENDENS.

See ABATEMENT, 2; JUDGMENTS AND DECREES, 2; MARRIAGE AND DIVORCE, 9, 13.

MALPRACTICE.

See PHYSICIANS AND SURGEONS, 2-6.

MANDAMUS.

1. **MANDAMUS WILL LIE TO COMPEL A SHERIFF TO ENFORCE AN ORDER OF RESTITUTION** of possession of land, issued upon appeal in a case where a party has been wrongfully dispossessed through the agency of a superior court, though, in the mean time, a third person, not in collusion with either party to the suit, has gained possession of the premises, claiming a title derived from an independent source. *Quan Wo Chung Co. v. Lasmeister*, 261.
2. **LEGALITY AND VALIDITY OF ELECTION OF OFFICER MAY BE INQUIRED INTO BY MANDAMUS WHEN.** — When a city charter provides that an election shall be made by the mayor and aldermen by ballot, no other official being directed to declare or certify it, and no provision is made for a contest, the legality and validity of such election may be inquired into in any proceeding by *mandamus* to compel others to recognize the claimant's title to the office, or when he seeks to enter into it, or otherwise assert his right to act as duly elected. *Lawrence v. Ingersoll*, 870.

See INJUNCTIONS.

MARKETABLE TITLE.

See VENDOR AND VENDEE, 3-6.

MARRIAGE AND DIVORCE.

1. **COHABITATION AND PROMISE OF MARRIAGE DOES NOT ESTABLISH.** — The illicit cohabitation of a man and woman as husband and wife for one week prior to the death of the former, under an agreement that the

marriage ceremony was to be performed the next week, and the acknowledgment of the man that the woman was his wife, in the presence of witnesses, is not sufficient to constitute marriage. *Estate of Grimm*, 796.

2. **PRESUMPTION — REBUTTAL.** — The presumption of marriage arising from the illicit cohabitation and reputation of marriage between a man and woman is rebutted by evidence that no marriage ceremony has in fact taken place between them. *Id.*
3. **BREACH OF PROMISE OF MARRIAGE — IMPROPER MOTIVES OF DEFENDANT.** — **INSTRUCTION ASSUMING FACTS NOT PROVED.** — In an action for breach of promise of marriage, where the record discloses no sort of improper motive on the part of defendant in entering into the alleged contract of marriage, it is prejudicial error toward him for the court to assume and to intimate to the jury that evidence exists tending to show such improper motive. Therefore, in such a case, an instruction that "a man who enters into a contract of marriage with a woman, with improper motives, and then ruthlessly and unjustifiably breaks it off, does a wrong to the woman, for which she is entitled to exemplary damages," is erroneous. *Moore v. Hopkins*, 248.
4. **CRUELTY OF TREATMENT AS GROUND FOR DIVORCE A MENSA ET THORO.** — Outbreaks of passion and violence on the part of a wife when she is under the influence of drink and beyond self-control do not constitute such cruel treatment of the husband as will justify a divorce *a mensa et thoro*. *Shutt v. Shutt*, 519.
5. **DRUNKENNESS DOES NOT CONSTITUTE SUCH EXCESSIVELY VICIOUS CONDUCT** on the part of a wife as will justify a divorce *a mensa et thoro* under the Maryland code, although it may be accompanied with gross and revolting language, and lead to disagreeable broils in the family. *Id.*
6. **MORPHINE HABIT NOT HABITUAL DRUNKENNESS.** — Proof of habitual intoxication produced by the hypodermic administration of morphine will not sustain a complaint for divorce under the Illinois statute alleging "habitual drunkenness" as a cause of action, for the reason that the words "habitual drunkenness," as used in the statute, mean that state or condition which follows from taking into the body, by drinking or swallowing, excessive quantities of intoxicating liquor. *Youngs v. Youngs*, 313.
7. **CRUELTY — WHAT IS NOT.** — In an action for divorce on the ground of cruelty, where the violence complained of was provoked by the complainant's attempts to take morphine from her husband while he was attempting to administer the drug to himself while in a state of partial or total delirium, and his acts consisted mainly in resisting such attempts, the complainant cannot set up the treatment thus received by her as extreme and repeated cruelty within the meaning of the statute. *Id.*
8. **CONDONATION OF CRUELTY.** — In an action for divorce on the ground of cruelty, where it is shown that the last act of violence to the complainant was committed three months before she ceased to live and cohabit with the defendant, there is such condonation as will bar the complainant's right to relief, in the absence of proof of subsequent conduct on the part of defendant sufficient to do away with such condonation. *Id.*
9. **ALIMONY — PERMANENT ALLOWANCE.** — Alimony, in its strict legal sense, and as used in section 137, Civil Code of California, proceeds only from husband to wife, and as a means of support for her *pendente lite*. Therefore, after divorce, there can be no alimony; but the permanent

allowance provided for in section 139 of such code, which may be given the wife after divorce for an offense of the husband, is not alimony, nor a mere substitute for the wife's interest in the community or separate property of the husband. It is given the wife as compensation for the wrong done to her by the husband. *Ex parte Spencer*, 266.

10. PERMANENT ALLOWANCE FOR SUPPORT OF WIFE. — When a divorce is granted for the offense of the husband, the court may, under section 139, Civil Code of California, independent of the property then in case, compel him to pay out of his future earnings a suitable monthly allowance for the support of the wife during life, or for a shorter period, having regard to their circumstances, the husband's earnings, or ability to earn money, by way of compensation to the wife for deprivation growing out of his own wrong. Such allowance may be increased or diminished as, in the opinion of the court, the changed circumstances of the parties may warrant. *Id.*
11. PERMANENT ALLOWANCE TO WIFE — CONTEMPT OF HUSBAND IN NOT PAYING. — When the court granting a divorce has ordered the husband to pay a permanent monthly allowance for the support of his divorced wife, it may imprison him for contempt for violation of its order. His only remedy is to purge himself of such contempt by showing, to the satisfaction of the court, that he is unable to obey the order, and that his inability has not been caused by his own act for the purpose of avoiding payment. When imprisoned for violation of such order, he is not entitled to his discharge upon *habeas corpus*, if the court, finding him able to pay the allowance, has jurisdiction as shown by the record. *Id.*
12. ALIMONY MAY BE ALLOWED IN AN ACTION TO HAVE A MARRIAGE DECLARED VOID because the defendant at the time of such marriage was the husband of another woman who is still living. *Lea v. Lea*, 692.
13. SUIT FOR DIVORCE, WHAT IS. — A SUIT TO HAVE A MARRIAGE DECLARED VOID because one of the parties was incompetent to enter into it is properly styled a suit for a divorce, and the woman who is plaintiff in such suit may be awarded alimony *pendente lite*. *Id.*
See HOMESTEAD, 1; HUSBAND AND WIFE, 12; WILLS, 22, 23.

MARRIED WOMEN.

See ESTOPPEL, 3-5; WILLS, 25, 26.

MASTER AND SERVANT.

1. ONE WHO IS OPERATING A COAL MINE BY THE AID OF CARS AND OTHER MACHINERY, while he is not an insurer of the safety of his employees, is yet bound to do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of the mine, to put and keep it and the instrumentalities there used in a safe and good condition. *South West Imp. Co. v. Smith*, 59.
2. MASTER WHO UNDERTAKES TO RUN DANGEROUS MACHINERY WITH INSUFFICIENT HELP, in consequence of which a servant is injured, is guilty of negligence, and is answerable to the servant so injured. *Id.*
3. A MASTER MAY BE HELD ANSWERABLE FOR INJURIES SUFFERED BY A SERVANT through the neglect of the master to supply with sufficient brakes a train of cars which was being operated in a coal mine, in which the servant was employed, or from the operating of such cars in the

absence of insufficient help, whereby there was a failure to properly sprag or chock them. *Id.*

4. **MASTER'S PRESUMPTIVE KNOWLEDGE OF DANGEROUS MACHINERY.** — An electric light company is presumed to know the dangerous character and condition of its wires, endangering the person and life of its employee in the discharge of his duty; and ignorance of the danger on the part of the company will not excuse it from liability to an employee who is injured without notice of the peril to which he is exposed. *Myhan v. Louisiana etc. Co.*, 436.
5. **DUTY TO WARN EMPLOYEE OF DANGEROUS MACHINERY.** — An electric light company is bound specially to warn its employee of the nature of the danger arising from coming in contact with its exposed wires, and it will not be excused in case of injury, unless it proves that the employee well knew the danger, and, notwithstanding, exposed himself willingly and deliberately to it. *Id.*
6. **EMPLOYEE'S PRESUMPTIVE IGNORANCE OF DANGEROUS MACHINERY.** — An employee of an electric light company is presumed to be ignorant of the danger arising from coming in contact with exposed wires, and in case of injury the burden of positive proof is on the company to show notice and knowledge of the danger on the part of the employee. *Id.*
7. **CONTRIBUTORY NEGLIGENCE — DANGEROUS EMPLOYMENT.** — It is not contributory negligence on the part of an employee to engage in a dangerous occupation. The risk assumed by the servant is the ordinary hazard incident to the employment, and unless the act causing the injury is necessarily and inevitably dangerous, no negligence can be imputed to him. *Id.*
8. **EMPLOYEE MAY ACT UPON PRESUMPTION** that the employer will not expose him to unnecessary risk, and has taken all necessary precautions, and may rely upon the care and trust to the superior knowledge, information, and judgment of the employer. *Id.*
9. **EMPLOYEE IS NOT BOUND TO INQUIRE AS TO LATENT**, but only patent, defects in machinery, and may presume that this inquiry has been made by the employer, upon whom the duty devolves; and although the servant may know of the defects, this will not defeat his claim for damages for injury, unless it is shown that he knew that the defects were dangerous. *Id.*
10. **MASTER IS LIABLE FOR SUBJECTING HIS SERVANT, THROUGH NEGLIGENCE**, to greater risks than those which fairly belong to the employment, and the servant need only raise a reasonable presumption of negligence on the part of the master, in order to recover for an injury received. *Id.*
11. **SERVANT'S KNOWLEDGE OF DANGEROUS AGENCY.** — Ignorance, on the part of a servant, of the dangerous character of the agency which he is called upon to use is no part of his cause of action for an injury sustained in the use of such agency. Hence, in an action by a street-car driver to recover for an injury from a vicious horse furnished for his use by the company, he need not allege his knowledge or lack of knowledge of the viciousness of the animal. *Donahue v. Enterprise R. R. Co.*, 854.
12. **SERVANT'S DUTY TO KNOW OF DANGEROUS AGENCY.** — A servant suing to recover for personal injury need neither allege nor prove his ignorance or lack of means of knowing that the agency which he was called upon to use was dangerous and unsafe, as it is the duty of the master to know this. That the servant knew or ought to have known the dangerous

- character of the agency involves his contributory negligence, and is an affirmative defense, imposing the burden of proof on the master. *Id.*
13. **RISKS ASSUMED, AND RIGHTS TO INSTRUCTIONS RELATING THEREIN.** — A servant assumes the risks ordinarily incident to his employment, but he has the right to expect his employer to provide machinery, tools, and appliances reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous, or such defect or danger is apparent. *Russell v. Dihworth*, 827.
 14. **DUTY TO PROTECT YOUNG SERVANTS.** — It is the duty of the master to take notice of the age and ability of young servants, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. *Id.*
 15. **INSTRUCTIONS AS TO RISKS QUESTION OF FACT.** — If a young servant employed in one capacity is injured while performing a different and more dangerous duty, which should have been performed by another and older servant, it is a question of fact for the jury whether the young servant had been sufficiently warned and instructed as to the dangerous employment, and whether the master had done all that was reasonably necessary to protect the servant. *Id.*
 16. **RISKS ASSUMED BY SERVANT.** — A servant must know the dangers of his employment, by actual experience in the employment, or by instructions of his master, before he can be held to have assumed them. *Id.*
 17. **RIGHT OF SERVANT TO PROTECTION.** — The scope of duty within which a servant is entitled to protection is to be defined by what he was employed to perform, and what, with the knowledge and approval of his master, he did perform, rather than by the verbal designation of his position and employment. *Id.*
 18. **A MINOR** no less than an adult servant takes upon himself the ordinary hazards incident to the service in which he is engaged. *South West Imp. Co. v. Smith*, 59.
 19. **EMPLOYEE HAVING FULL KNOWLEDGE OF THE EXISTENCE OF A DEFECT IN MACHINERY**, and continuing its use until the happening of an accident chargeable to the defect, and by which he is injured, cannot recover of his employer therefor. *Odell v. New York etc. R. R. Co.*, 650.
 20. **A SERVANT IS ANSWERABLE TO A FELLOW-SERVANT INJURED BY HIS NEGLIGENCE.** — Where two or more persons are engaged in the same general business of a common employer, in which their mutual safety depends somewhat upon the care exercised by them respectively, each owes to the other a duty, resulting from their relation of fellow-servants, to exercise such care in the prosecution of their work as men of ordinary prudence use in like circumstances, and he who fails in that respect is responsible for the resulting physical injury to his fellow-servant. *Hare v. McIntire*, 476.
 21. **INDEPENDENT CONTRACTOR IS ONE WHO, EXERCISING INDEPENDENT EMPLOYMENT, CONTRACTS** to do a piece of work according to his own methods, and without being subject to control of his employer, except as to the result of his work. *Powell v. Construction Co.*, 925.
 22. **EMPLOYER OF INDEPENDENT CONTRACTOR NOT LIABLE FOR LATTER'S NEGLIGENCE WHEN.** — One who employs a fit and proper person as an independent contractor to do work not in itself unlawful, or a nuisance, or necessarily attended with danger to others, is not responsible for such contractor's negligence, nor for that of his subcontractor or servants. *Id.*

- 22. STIPULATION THAT WORK SHALL BE DONE TO SATISFACTION OF EMPLOYER'S ENGINEER, EFFECT OF.** — The fact that a general railway contractor sublets a part of the work embraced in his own contract, and stipulates that the work is to be done in a thorough and workman-like manner, to the satisfaction of his chief engineer, is not evidence of such an assumption of a right to control, as to the details or methods of doing the work, as will make him responsible for the wrongs of such subcontractor or of his servants. Nor does the fact that the contract provides that the track is to be laid as far as such engineer shall order take it out of the rules applicable to independent contractors. *Id.*
- 24. INDEPENDENT CONTRACTOR LIABLE FOR ACTS OF SERVANT LENT TO HIM WHEN.** — The fact that one is the general servant of one employer does not, as matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. If he was performing a special service for an independent contractor, he will be, as to that particular service, the servant of him for whom such service was performed, although he may be the general servant of another. *Id.*
- 25. PAROL EVIDENCE ADMISSIBLE TO SHOW RELATION OF PARTIES DIFFERENT FROM THAT STATED IN CONTRACT.** — Although upon the face of a written contract the relation between the parties thereto seems to be that of employer and independent contractor, it is competent to show that the parties, as matter of fact, by their conduct, put a different construction upon it, and that in fact the relation was that of master and servant. *Id.*
See CARRIERS, 13, 14-19; RAILROAD COMPANIES, 8, 9.

MINOR SERVANTS.

See MASTER AND SERVANT.

MONOPOLIES.

See CONTRACTS, 6-8; CORPORATIONS, 11-16.

MORTGAGES.

- 1. PRIORITY AS BETWEEN ASSIGNEES OF BONDS SECURED BY ONE MORTGAGE.** — As between the assignees of two bonds maturing at different times, and secured by one mortgage, there are no priorities, in the absence of express stipulation on the subject, and each is entitled to share *pro rata* in the proceeds of the sale of the mortgaged premises, if not sufficient to pay the mortgage debt in full. *Gordon v. Hamard*, 857.
- 2. VOID FORECLOSURE SALE — EFFECT ON PURCHASER OR HIS GRANTEE.** — Where a mortgagee becomes the purchaser of the mortgaged property at a void foreclosure sale, obtains his deed, enters into possession, and then conveys the premises, his grantee, or any successor in interest of the latter, is an assignee of the mortgage debt and mortgage, and considered as a mortgagee in possession. *Cooke v. Cooper*, 709.
- 3. RIGHTS OF MORTGAGEE IN POSSESSION AFTER DEFAULT.** — While a mortgagee cannot maintain a possessory action to recover possession of the mortgaged premises by reason of the default of the mortgagor, still, if he can make a peaceable entry upon the mortgaged premises after condition broken, he may do so, and may thereafter maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of his debt. *Id.*

4. **RIGHT OF MORTGAGEE IN POSSESSION TO REMOVE BUILDINGS.**—A mortgagee in possession is not to be treated as a mere stranger who goes upon the land of another, and places improvements there without the consent of the owner; but he may lawfully take down and carry away any buildings erected by him on the mortgaged land, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it. *Id.*
5. **MORTGAGEE IN POSSESSION**, with the right to remove a building from the mortgaged premises, may exercise the right without a resort to equity. *Id.*
6. **MORTGAGEE, WHEN NOT CHARGEABLE WITH RENTS AND PROFITS.**—To charge a mortgagee with rents and profits, it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with such rents and profits. *Gaskell v. Viqueenry*, 364.
7. **PURCHASER AT FORECLOSURE, WHEN NOT LIABLE TO JUNIOR MORTGAGEE FOR RENTS AND PROFITS.**—A purchaser at a foreclosure sale who afterwards becomes the owner of the mortgaged premises by conveyance from the assignee in bankruptcy of the mortgagor is not liable for the rents and profits to a junior mortgagee not made a party to the foreclosure proceedings. *Id.*
8. **RENTS AND PROFITS—EVIDENCE.**—In an action by a junior mortgagee, not made a party to a foreclosure, to recover the rents and profits of the mortgaged premises from the purchaser at a foreclosure sale, the deed executed by the assignee of the mortgagor in bankruptcy to such purchaser is admissible in evidence to show his possession as owner, and not as mortgagee, and in such action evidence of the value of the rents and profits of the premises is not admissible. *Id.*
9. **REDEMPTION—RIGHTS OF JUNIOR MORTGAGEE.**—Where a junior mortgagee desires to redeem from a sale on a senior mortgage, he may do so, where he was not made a party to the foreclosure suit, without paying the costs, of such suit. *Id.*
10. **REDEMPTION BY JUNIOR MORTGAGEE—INTEREST.**—A junior mortgagee seeking to redeem should be compelled to pay the same rate of interest to the date of redemption as that drawn by senior liens. *Id.*
11. **MORTGAGEE'S RIGHT TO RENTS AND PROFITS.**—Where a mortgagor, after condition broken, makes an assignment of the mortgaged premises for the benefit of creditors, subject to existing liens, the mortgagee in his action to foreclose is not entitled to have a receiver appointed *pendente lite* to collect the rents and profits to be applied to the payment of the mortgage debt, merely because of the insolvency of the mortgagor and the insufficiency of the premises to pay such debt. *Seignious v. Pate*, 846.
12. **EFFECT OF ASSIGNMENT AS TO RENTS AND PROFITS.**—An assignment of the mortgaged premises by an insolvent mortgagor, made before foreclosure, and while the rents and profits belong to him, carries with it the right in the assignee to receive and apply the same as provided for in the assignment, although the mortgaged premises are insufficient to satisfy the mortgage debt. *Id.*
13. **A MORTGAGE IS A MERE SECURITY** for a debt. It is only a chattel interest, and the mortgagor continues the real owner of the fee. *Killebrew v. Hines*, 672.

14. **THE MORTGAGEE IS NOT ENTITLED TO THE RENTS and profits of the mortgaged premises until he, or some one in his behalf, takes actual possession.** *Id.*
 15. **MORTGAGEE, WHEN HAS NO RIGHT TO CROPS.** — If there be no entry or equitable proceedings by which the crops are sequestered, the mortgagee has no lien upon and cannot recover them, in an action in the nature of replevin therefor against the mortgagor or other persons. Even after entry or sequestration, if the mortgagor has been permitted to remain in possession and cultivate the soil, the mortgagee's interest in the crops is subordinate to the agricultural lien allowed by the statute of North Carolina to persons who have made advances to assist the mortgagor to make the crop. *Id.*
 16. **SUBROGATION TO RELEASED MORTGAGE.** — One who advances money with which to pay off a mortgage, in pursuance of an agreement that he should do so, and that the mortgage should be discharged of record, and a new mortgage given him on the same property for the amount so advanced, is entitled to be subrogated to the mortgage, and to have the satisfaction of record set aside, and a decree foreclosing such mortgage in his favor, as against the original mortgagor, and one who, with knowledge of all the facts, received a conveyance of the property. *Wilton v. Mayberry*, 193.
- See **CHATTEL MORTGAGES; EVIDENCE**, 1; **HUSBAND AND WIFE**, 11; **INSURANCE**, 20; **PAYMENT**, 1-5, 6; **VENDOR AND VENDER**, 1.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATION NEED NOT SEEK ITS CREDITOR and tender him money due from it, in order to stop the accumulation of interest on its debt.** *Friend v. Pittsburgh*, 811.
2. **PLACE OF PAYMENT OF INDEBTEDNESS — INTEREST.** — The municipal treasury is the place where the municipality's bonds are to be paid, unless some other place is expressly provided; and until a bond has been there presented and payment refused at maturity, the city is not liable for subsequently accruing interest, if it has funds on hand to pay the bond at maturity. *Id.*
3. **BONDS — PAYMENT — INTEREST.** — The holder of a municipal bond payable in installments, but not presented for payment until the last one matured, is entitled to recover interest on overdue installments up to such time as the city provided funds for their payment. *Id.*
4. **DISCRETION OF MUNICIPAL OFFICERS — A COURT OF EQUITY WILL NOT UNDERTAKE TO CONTROL the judgment of the common council of a municipal corporation, and compel them to build a public hall upon a lot which they do not think is suitable or convenient for that purpose, though the municipality had previously accepted the conveyance of such lot upon the condition that such hall should be built thereon.** *Kendall v. Frey*, 118.
5. **ONE COMMON COUNCIL OF A CITY CANNOT BIND ITS SUBSEQUENT OFFICIALS to build a hall upon a particular lot, if the latter believe such lot is not an advantageous and suitable site for such building.** *Id.*
6. **LIABILITY FOR DEFECTS IN STREETS.** — When a city by its charter is under obligation to keep the streets and highways within its limits in repair and in a safe and convenient condition for travel, it is liable in damages to one who is injured by reason of its neglect of such duty. *Farquar v. Roseburg*, 732.

7. **STREETS.** — IF A CONVEYANCE IS MADE OF A TOWN OR CITY LOT AS BOUNDED BY STREETS OR ALLEYS marked on a map or plat, and the grantee enters into possession, and expends money in improving the property, he is entitled to a right of way over such streets or alleys as appurtenant to the land, and any subsequent conveyance by his grantor, or those claiming under him, of a portion of such streets or alleys by which the land is bounded, will be held void. *Moose v. Carson*, 681.
8. **DEDICATION OF STREETS TO PUBLIC USE IS IRREVOCABLY MADE** when the owner of land including such streets lays out the land into lots and streets, and induces persons to buy and build upon lots adjacent to such streets, though they may not have been accepted by the authorities of the town or city in which they lie. *Id.*
9. **STREETS AND PUBLIC SQUARES.** — ADVERSE OCCUPANCY of a street or public square which has been dedicated to public use will not confer any right as against the public. *Id.*
10. **STREETS, SALE OF, BY TOWN OR CITY.** — OWNERS OF LANDS FRONTING UPON A PUBLIC STREET in which they have an easement, arising from their having purchased all such lands from the former owner thereof, and of such streets, and procured a conveyance thereof in which their lots are designated as bounded by such streets, cannot be deprived of their rights by a sale for the benefit of the town, which was, in effect, though not in name, one of the grantors through whom they claim title. *Id.*
11. **STREETS, VESTED INTEREST OF LOT-OWNERS THEREIN.** — THE LEGISLATURE CANNOT DEPRIVE A LOT-OWNER of his right in a public street, acquired by his having bought, occupied, and improved the land adjacent thereto after such land had been laid out in lots and streets, and when his conveyance describes his lot as being bounded by such streets. The lot-owner's interest in the street is just as indefeasible and secure from legislative impairment as is his title to his lot. *Id.*

See ELECTIONS, 1-5; MANDAMUS, 2; NEGLIGENCE, 13-19.

MURDER.

See CRIMINAL LAW, 14, 15.

MUTUAL BENEFIT ASSOCIATIONS.

See INSURANCE, 21-25.

NEGLIGENCE.

1. **EVIDENCE — NONSUIT.** — In an action against a railroad company for negligently killing a person while on the track, at a street crossing, where the plaintiff's evidence establishes the indisputable fact that the deceased saw the train approaching while he was in a place of safety, and voluntarily took the chances of crossing in front of it, evidence as to the danger of the place, the rate of speed of the train, the absence of warning, and the obstructions to sight and hearing become wholly unimportant, and plaintiff should be nonsuited, or a verdict directed against him. *Aiken v. Pennsylvania R. R. Co.*, 775.
2. **NEGLIGENCE IS GENERALLY A QUESTION OF FACT** to be decided upon all circumstances, and the court ought not to declare it, as matter of law, unless there is a plain act of carelessness upon the part of the plaintiff contributing to his injury. *Moukler v. Willamette etc. Ry Co.*, 717.

2. **NEGLIGENCE OF PARENT NO DEFENSE IN ACTION BY CHILD FOR NEGLIGENT INJURY.** — The negligence of a mother in permitting her child of tender years to go upon a public street unattended by a person of mature years, where it is injured by being run over by a cable-car, is no defense to an action by the child to recover for its injuries. *Winters v. Kansas City Cable Railway Co.*, 591.
4. **NEGLIGENCE OF PARENT IN ACTION BY HIM FOR INJURY TO CHILD.** — Even where the action is brought by a parent for an injury to his child, all the circumstances are to be taken into account, and if the parent took as much care of the child as reasonably prudent persons of the same class and in the same situation in life ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action. The negligence of the parent to defeat such action must be the proximate cause of the injury. *Id.*
5. **ORDINARY CARE MEANS THAT DEGREE OF CARE** which an ordinarily prudent and careful person would exercise under like circumstances. *Id.*
6. **CHILD INJURED BY RUNNING IN FRONT OF CABLE-CAR CANNOT RECOVER,** if the gripman operating the car was free from negligence. *Id.*
7. **CONTRIBUTORY NEGLIGENCE.** — The rule that a person in a position of danger is not responsible for a mistake of judgment in getting out is subject to the qualification that he must have got into danger without negligence or fault of his own. *Aiken v. Pennsylvania R. R. Co.*, 775.
8. **DUTY TO STOP, LOOK, AND LISTEN.** — The rule that a man, before crossing a railroad track, must stop, look, and listen, applies equally to persons walking as to persons driving. It is not a rule of evidence, but of law, peremptory, absolute, and unbending, and a failure to observe it is not merely evidence of negligence, but negligence *per se*. *Id.*
9. **CONTRIBUTORY NEGLIGENCE.** — **WHEN ONE RISKS HIS LIFE,** or places himself in a position of danger, endeavoring to save the life of another, or to protect him from a sudden danger of great bodily harm or unexpected peril, such exposure and risk for such purpose is not negligence. The law will not impute negligence to an effort to preserve human life, unless under such circumstances as to constitute rashness in the minds of prudent persons. *Peyton v. Texas etc. R'y Co.*, 430.
10. **CONTRIBUTORY NEGLIGENCE IN CROSSING RAILWAY TRACK — BURDEN OF PROOF.** — One who is injured by collision with a railway train at a crossing must, to entitle him to recover for the injuries sustained, establish his freedom from contributory negligence by showing that he approached the crossing with prudence and care, and with senses alert to the possibility of approaching danger. *Brickell v. New York etc. R. R. Co.*, 648.
11. **DRIVER OF VEHICLE, NEGLIGENCE OF.** — One injured at a railway crossing, while riding in a vehicle driven and owned by another, cannot recover of a railway company for such injuries, where he, as well as such driver, was negligent in not making any effort to ascertain whether or not a train was approaching. *Id.*
12. **CONTRIBUTORY NEGLIGENCE WHILE ACTING IN A PERILOUS POSITION.** — If one, through the negligence of another, is placed in a situation of peril, where he must adopt a perilous alternative, or where, in the terror of an emergency for which he was not responsible, he acts wildly or negligently, contributory negligence will not be imputed to him, because persons in great peril are not required to exercise the same presence of mind and

- carefulness which would be exacted of them in ordinary circumstances. *South West Imp. Co. v. Smith*, 59.
13. **DISCHARGE OF FIRE-WORKS AT SUITABLE PLACES IS NOT UNLAWFUL**, when not prohibited by statute or municipal regulations; but the circumstances may be such as to make it culpable negligence. *Dowell v. Gularie*, 598.
 14. **SHOOTING OFF FIRE-WORKS FROM VERANDA OF COURT-HOUSE**, in the center of a public square in a city, from troughs so arranged that the rockets would pass over the persons there assembled to witness the display, is not, in and of itself, an unlawful or wrongful act. *Id.*
 15. **BURDEN OF PROOF OF NEGLIGENCE IS ON PLAINTIFF WHEN.** — When a plaintiff's case is founded on negligence, and not upon intentional injury, the burden of proof is upon him, throughout the trial, to prove it. *Id.*
 16. **WHETHER FIRE-WORKS WERE NEGLIGENTLY DISCHARGED IN PARTICULAR CASE IS QUESTION FOR JURY.** — In an action to recover damages for the negligent discharge of fire-works, the question whether the defendants exercised the care in handling and discharging them that cautious and prudent persons would have used under like circumstances is to be determined by the jury from a consideration of a number of particular facts; and it is not proper, in such a case, for the court to select some of the leading facts, and to declare, as a matter of law, that such facts constitute negligence. *Id.*
 17. **EVIDENCE WHICH DISCLOSES DISASTER IS OF ITSELF SUFFICIENT** to entitle the plaintiff to go to the jury, where the defendant had charge of instruments which were highly dangerous. And it is therefore error for the court to instruct the jury that evidence which showed that fire-works were dangerous, and were discharged by the defendants, and that plaintiff was injured thereby, would not alone authorize them to draw the inference of want of due care. *Id.*
 18. **JURY NOT REQUIRED TO FIND WHICH PARTICULAR ACT OF NEGLIGENCE CAUSED INJURY WHEN.** — Where the evidence tends to show that a large quantity of combustible materials was placed on the floor of a narrow veranda, in the windows opening onto it, and on chairs near the windows, that the defendants smoked cigars during the entire performance, and that loose candles were found on the floor, on fire, it is error for the court to instruct the jury that, before finding for the plaintiff, who was injured by the discharge of one of the rockets on the veranda, they must determine which particular act of negligence occasioned the unforeseen discharge of the rocket which caused the injury. *Id.*
 19. **PRESENCE OF PLAINTIFF AT DISPLAY OF FIRE-WORKS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE WHEN.** — The mere presence of the plaintiff at a display of fire-works, as a spectator, where it does not appear that he had anything to do with the discharge, does not make him a joint wrong-doer, or render him guilty of contributory negligence. *Id.*
- See **BANKS AND BANKING**, 4, 5, 10, 11; **CARRIERS**, 8-11, 23-25; **DAMAGES**, 1-4; **LANDLORD AND TENANT**, 2, 3; **MASTER AND SERVANT**, 2, 3, 10, 20, 22; **MUNICIPAL CORPORATIONS**, 6; **RAILROAD COMPANIES**.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE—WHAT IS NOT.** — An instrument acknowledging a certain sum to be due and payable when a suit in litigation is settled is not a promissory note. *Burgess v. Fairbanks*, 230.

2. **NOTE OF CORPORATION, WHAT IS.** — Promissory note commencing with "we promise to pay," and signed "San Pedro Mining and Milling Company, F. Kraus, President," is the note of the company only, and parol evidence is not admissible to prove that the president did not sign the name of the company, but did sign his own name as a joint maker. *Liebecker v. Kraus*, 171.
3. **A TOWN ORDER**, although not negotiable paper to the extent that a transfer to an innocent holder shuts out equitable defenses, may be negotiable in form, and become transferable under the same rule of law that would be applicable to negotiable paper. *Ferguson v. Staples*, 470.
4. **INDORSER OF A FORGED OR VOID NOTE** may be sued for the consideration paid to him, or he may be held as a party, without demand and notice. *Id.*
5. **INDORSER OF A TOWN ORDER VOID, BECAUSE ISSUED WITHOUT AUTHORITY**, is answerable to his indorsee, in an action for money had and received, for the amount paid by the latter to the former therefor. *Id.*
6. **NOTE GIVEN BY MAKER IN SETTLEMENT OF LOSS SUSTAINED WHILE DEALING IN FUTURES** is void in the hands of the payee, and that though such payee pretended to be or was a mere agent in the transaction, where he knew of and participated in its illegality. *Snoddy v. Bank*, 918.
7. **NOTE GIVEN IN CONSIDERATION OF GAMING CONTRACT IS VOID IN HANDS OF INNOCENT HOLDER**, by indorsement for value before due, and without notice of the illegality of the consideration. The statute need not expressly declare such a note void, if it does so by necessary implication, and a statute does by necessary implication make such note void when it makes the contract under which it is executed void and criminal. But the Tennessee statute goes further, and makes the transfer of such a note to a party ignorant of its illegality a criminal offense. *Id.*
8. **ONE WHO FRAUDULENTLY PLACES IN CIRCULATION A NEGOTIABLE INSTRUMENT OF ANOTHER**, whether made by him or his apparent authority, and thereby renders him liable to a *bona fide* purchaser, is guilty of a tort, and, in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value of such instrument. *Metropolitan E. R'y Co. v. Kneeland*, 619.
9. **BURDEN OF PROOF OF BONA FIDE TRANSFER OF NEGOTIABLE NOTE ON HOLDER WHEN.** — Where it is clear that a note had its origin in fraud, and the answer alleges a purchase in good faith, the burden is on the defendant who claims to own the note to show a *bona fide* transfer thereof before maturity, and this burden is not sustained by evidence from which the date of the transfer does not appear except by inference. *Henry v. Sneed*, 580.
10. **CONSIDERATION FOR INDORSEMENT.** — Negotiable instrument transferred before due, as collateral security for a pre-existing debt, with no new consideration between the parties to such transfer, is subject to any defense that might have been made as between the original parties. *Smith v. Bibber*, 464.
11. **FORBEARANCE TO SUE, WHEN A SUFFICIENT CONSIDERATION.** — Actual forbearance to sue for the collection of an existing debt is not a sufficient consideration to support a transfer of a negotiable instrument to secure the original debt, so as to cut out a defense existing against such paper as between the original parties thereto, unless there was a valid promise to forbear for some specific time, so that for such time the right of action was suspended. *Id.*

12. **NOTE PAYABLE ON DEMAND, WITH INTEREST**, is not a continuing security on which an indorser remains liable until actual demand; but to charge the indorser, payment must be demanded of the maker within a reasonable time, and notice of such demand and of non-payment given to the indorser. *Turner v. Iron Chief Mining Co.*, 168.
13. **DEMAND NOTE — UNREASONABLE DELAY IN PRESENTING FOR PAYMENT.**— A delay of ten months after the indorsement of a note payable on demand, with interest, to present the note for payment, is such unreasonable delay that it, as a matter of law, releases the indorser. *Id.*
- See **AGENCY**, 2; **BANKS AND BANKING**, 7-26; **CORPORATIONS**, 34-38; **HUSBAND AND WIFE**, 5.

NEW TRIAL.

See **CRIMINAL LAW**, 15.

NON ASSUMPSIT.

See **TRIAL**, 5.

NONSUIT.

See **NEGLECTENCE**, 1.

NOTARY PUBLIC.

See **ACKNOWLEDGMENTS**.

NOTE.

See **NEGOTIABLE INSTRUMENTS**.

NOTICE.

See **AGENCY**, 2; **AUCTION AND AUCTIONEERS**; **CHattel MORTGAGES**; **DEEDS**, 7-9; **PAYMENT**, 9; **PROCESS**; **SALES**, 13, 14; **STATUTES**, 1.

OFFICE AND OFFICERS.

See **EQUITY**, 1; **MUNICIPAL CORPORATIONS**, 4, 5.

PARDON.

See **CRIMINAL LAW**, 7.

PARENT AND CHILD.

ADOPTION — POWER OF LEGISLATURE — CONSTITUTIONAL LAW.— The legislature has full and exclusive power in matters of adoption, and may invest any person, officer, or court with the power of receiving, witnessing, and declaring the adoption, as well as prescribe what the ceremony shall be and before whom it is to be celebrated. When the power of adoption is vested in a county judge, his act in the matter is one of judgment, and in that sense judicial, but is no part of the judicial power mentioned in the constitution, and by it vested in the courts. *Estate of Stevens*, 252.

See **DAMAGES**, 1, 2; **DEEDS**, 4; **NEGLECTENCE**, 3-6; **SERVICES**; **WILLS**, 21.

PAROL LEASE.

See **LANDLORD AND TENANT**, 5-10.

PAROL TESTIMONY.

See CONTRACTS, 3, 4, 12; EVIDENCE, 1; MASTER AND SERVANT, 23; NEGOTIABLE INSTRUMENTS, 2; WILLS, 2, 10.

PARTIES.

See CREDITORS' BILLS, 4; EMINENT DOMAIN, 4; EQUITY, 2; JUDGMENTS AND DECREES, 5.

PARTITION.

PETITION FOR PARTITION NOT MULTIFARIOUS WHEN.—Where children of a grantee take as tenants in common, a petition for partition is not multifarious because it joins all those living and the heir of one deceased as parties defendant, though some of the tenants have purchased the interests of others. Such purchase does not confer upon the purchasers any exclusive right to any portion of the land. And where in such suit a general right to the whole land is being litigated, and this is the basis of the litigation, it matters not that the parties litigant rely upon distinct and independent rights. *Waddell v. Waddell*, 575.

PARTNERSHIP.

1. **MEMBERS OF PARTNERSHIP ARE DISTINCT BEINGS** from the firm, as well as from each other, and their rights and liabilities are to be tested and adjudicated accordingly. Hence a bank has no lien or claim on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them from the firm. *Raymond v. Palmer*, 398.
2. **LIABILITY OF INDIVIDUAL MEMBER FOR FIRM TORTS.**—Each partner is the agent of the firm while engaged in the prosecution of the partnership business, and the firm is liable for the torts of each, if committed within the scope of his agency. *Hess v. Lowrey*, 355.
3. **INDIVIDUAL CREDITORS OF A MEMBER OF A PARTNERSHIP ARE NOT ENTITLED TO PRECEDENCE OVER PARTNERSHIP CREDITORS**, after the latter have exhausted their remedy against the partnership assets. The property of one who has been a member of the partnership is liable for his partnership debts to the same extent as for his individual debts, except that the holder of the partnership debts may be required to exhaust his remedy against the firm before resorting to the property of its individual members. *Blair v. Blair*, 30.
4. **PARTNERSHIP ASSETS, INDIVIDUAL CREDITOR, WHEN ESTOPPED FROM DENYING.**—When two persons have held themselves out as partners, and purchased goods as such, a creditor who has held a judgment note against one of them for a long time, and who knew they were holding themselves out as partners, and buying goods as such, and who never gave notice to any of their creditors that they were his debtors, is estopped from claiming that they were not partners, and that the judgment entered on his note is entitled to precedence over a judgment subsequently levied for a partnership debt, created while the defendants in that judgment were holding themselves out as partners, and obtaining credit as such. *Powers v. Large*, 195.

See ABATEMENT, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS; EXECUTIONS, 3; HOMESTEAD, 4, 5; PLEADING, 3.

PAYMENT.

1. **WHO MAY RECEIVE.** — Mortgagor making payment on a mortgage to one other than the mortgagee does so at his peril, and must assume the burden of proving that it was made to one clothed with authority to receive it. Payment of a mortgage to one having apparent authority to receive it will be treated as if actual authority existed. *Craze v. Grunewald*, 642.
2. **PAYMENT TO ATTORNEY.** — Authority on the part of an attorney to receive payment of a mortgage exists when he negotiated the loan for the mortgagee, and the latter permitted him to retain possession of the bond and mortgage after the principal was due, and the mortgagor, with knowledge of that fact, and relying upon the apparent authority thus afforded, made payment to him. The mortgagee under such circumstances will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated. *Id.*
3. **PAYMENT TO AN ATTORNEY HAVING POSSESSION OF A BOND AND MORTGAGE** is not invalidated by the fact that the mortgagor who made such payment did not then see the bond and mortgage, if, in response to his inquiry, he was informed that they were still in the possession of the attorney, and such information was true. *Id.*
4. **PRESUMPTION OF CONTINUANCE OF AUTHORITY TO RECEIVE.** — If an attorney is given apparent authority to receive payment of a bond and mortgage by the fact that he negotiated the loan, and they are by the mortgagee left in his possession, there is no presumption that this authority or possession continues; and every time the mortgagee makes a payment to such attorney, he must ascertain that the bond and mortgage remain in his possession. *Id.*
5. **TERMINATION OF AUTHORITY TO RECEIVE.** — Authority of an attorney to receive payment of a bond and mortgage left in his possession by the mortgagee terminates on his parting with such possession, though he does so unlawfully, and without the knowledge of the mortgagee. The payments subsequently made to him upon his false assurance that he still retained possession of the bond and mortgage are inoperative. *Id.*
6. **APPLICATION OF PAYMENTS.** — Where a person indebted to another on a mortgage or on a judgment, and also on an open account or on a note, makes a payment generally, and the creditor has made no appropriation of such payment, the law will apply it to the most burdensome debt, that is, to the mortgage or judgment, in preference to the note or open account. But where the debtor is indebted on a mortgage and on a judgment, both of which are liens on his property, the payment ought to be applied to the oldest lien due and enforceable at the time the payment is made. *Frazier v. Lanahan*, 516.
7. **CHECK AS CONDITIONAL PAYMENT.** — In the absence of any special agreement to the contrary, the mere acceptance by a creditor from his debtor of the check of a third person, payable to the creditor's order, for a pre-existing debt, is not absolute, but merely conditional, payment, defeasible on the dishonor or non-payment of the check, and the burden of proof is on the debtor to show that the check was taken as absolute payment. *Holmes v. Briggs*, 804.
8. **CHECK AS CONDITIONAL PAYMENT.** — Where a creditor has accepted from his debtor the check of a third party as conditional payment for an existing debt, the facts that he does not give the debtor prompt notice of the dishonor of the check, but retains it, and collects a dividend on it

out of the assigned estate of the drawer, do not raise a presumption that the check was accepted as absolute payment, but that question is for the jury to determine. *Id.*

2. CHECK AS CONDITIONAL PAYMENT — NOTICE OF DISHONOR TO DEBTOR. — Where the debtor has given his creditor the check of a third person in payment of an existing debt, and the debtor is not a party to the check, either as drawer, payee, or indorser, he is not strictly entitled to notice of dishonor, and cannot complain of delay in giving such notice, without proof that he has actually sustained loss or damage thereby. *Id.*

See BANKS AND BANKING, 12, 13; COSTS, 2, 3; HUSBAND AND WIFE, 11; MUNICIPAL CORPORATIONS, 1-3; NEGOTIABLE INSTRUMENTS, 12, 13; SURETSHIP, 2.

PENALTY.

See BONDS; HUSBAND AND WIFE, 1.

PERJURY.

See HUSBAND AND WIFE, 13.

PERSONAL EXAMINATION.

See PHYSICIANS AND SURGEONS, 4-6.

PERSONAL INJURIES.

See DAMAGES, 3, 4; MASTER AND SERVANT, 3, 5, 11, 12, 20; NEGLIGENCE; RAILROAD COMPANIES.

PETITION.

See PLEADING, 1.

PHYSICIANS AND SURGEONS.

1. PATIENT MAY WAIVE PROTECTION AFFORDED BY STATUTE AGAINST CALLING PHYSICIAN to give evidence of information acquired in a professional character; and what he may do in his lifetime those who represent him after his death may also do for the purpose of protecting interests claimed under him. When, therefore, the dispute is between the devisee and heirs at law of a testator, all claiming under the deceased, either the devisee or heirs may call the testator's attending physician as a witness. *Thompson v. Ish*, 552.
2. MALPRACTICE — SURVIVAL OF ACTION AGAINST PARTNER. — When, during the pendency of an action against two physicians, as partners, for damages caused by negligence and unskillfulness in setting and treating a dislocated shoulder, one of them dies, the action abates as against his personal representative, but may be prosecuted to judgment against the surviving partner. *Heds v. Lowrey*, 355.
3. MALPRACTICE — EVIDENCE OF DECLARATION OF DECEASED PARTNER. — In an action against the surviving member of a firm of physicians for damages for malpractice, the plaintiff may describe the acts and repeat the declarations made to him by the deceased partner while resetting his broken shoulder, and while treating him afterwards for the injury sustained. *Id.*
4. MALPRACTICE — EXHIBIT OF INJURED LIMB TO JURY. — In an action against the surviving member of a firm of physicians for damages for malpractice in resetting a shoulder, the plaintiff may exhibit his shoulder to the jury. *Id.*

5. **MALPRACTICE — EVIDENCE AS TO SKILL.** — In an action against the surviving partner of a firm of physicians for malpractice in resetting a dislocated shoulder, evidence that the deceased partner, who set the member, was, prior to and at that time, extensively engaged in the management of farms, is admissible as affecting his skill and knowledge in his profession. *Id.*
6. **MALPRACTICE — WHEN PERSONAL EXAMINATION MAY BE REFUSED.** — In an action against a physician for malpractice, if application is seasonably made, the plaintiff may be required to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the extent, nature, or permanency of injuries; but where the application is not made until after the close of the plaintiff's evidence, and no reason is shown for the delay, it is not error to refuse the order, especially where the plaintiff offers to submit to a private examination as soon as the attendance of medical experts on his behalf can be secured. *Id.*

See WITNESSES, 3.

PLEADING.

1. **PETITION, AIDING BY ANSWER.** — Any lack in a petition of tender of an issue as to whether the defendant was a purchaser in good faith of the notes in suit is supplied by an allegation in the answer that the notes were purchased by the defendant in good faith. *Henry v. Sneed*, 580.
2. **PLEADING AND PROOF.** — When each cause of action is declared on in several different forms of averment, the allegations of each paragraph of the complaint need not be proved. *Culver v. Marks*, 377.
3. **AMENDMENT BY INSERTING NAMES OF MEMBERS OF FIRM.** — If an action is brought in the name of a firm, and all the papers therein are thus entitled up to the time of the trial, the court may at any time before judgment amend the proceedings by inserting in the place of the firm name the names of the partners therein as plaintiffs. *Frick v. Reigelman*, 198.

See ATTACHMENT AND GARNISHMENT, 3; CONTRACTS, 13; CREDITORS' BILLS, 4
PARTITION.

POLICE POWER.

See CONSTITUTIONAL LAW, 5, 6.

POOLS.

See CONTRACTS, 6-8.

PRESCRIPTION.

See EASEMENTS, 3, 4.

PRIORITIES.

See MORTGAGES, 1.

PRIVATE WAYS.

See EASEMENTS, 1.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT; CRIMINAL LAW, 5, 6; HUSBAND AND WIFE, 4,
13; PHYSICIANS AND SURGEONS, 1.

PROBATE SALES.

See JUDICIAL SALES, 6, 7.

PROCESS.

1. WHEN AN ORDER OF PUBLICATION DIRECTS THAT A SUMMONS be published in the "Daily Leader, a newspaper published in the city of Eau Claire, county of Eau Claire," and the affidavit filed shows publication in the "Eau Claire Daily Leader, a daily newspaper printed and published at the city of Eau Claire, in said county of Eau Claire," it sufficiently appears that the summons was published in the paper designated in the order. *Frisk v. Reigelman*, 198.
2. AFFIDAVIT THAT A SUMMONS WAS PUBLISHED "SIX WEEKS SUCCESSIVELY, commencing," etc., does not show compliance with a statute requiring publication to be made "not less than once a week for six weeks." *Id.*
3. CORRECTED AFFIDAVIT OF THE PUBLICATION OF SUMMONS MAY BE FILED IN SUPPORT OF JUDGMENT, where it appears that the affidavit as so corrected is true, and establishes compliance with the law and an order of the court directing the publication of such summons, and when so filed it may be transmitted to the appellate court in which the original action or a proceeding connected therewith is pending for review. *Id.*
4. SUMMONS—CONSTRUCTIVE SERVICE OF.—If a summons is not personally served on the defendant, it is essential to the validity of the judgment against him that there was a valid order for the publication of summons and due publication thereof, and before such an order could be made, a verified complaint must have been filed. *Id.*

See CARRIERS, 1; JURISDICTION, 1.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLICATION.

See PROCESS.

PURCHASERS.

See VENDOR AND VENDEE.

QUANTUM MERUIT.

See WILLS, 21.

QUORUM.

See ELECTIONS, 2.

RAILROAD COMPANIES.

1. NEGLIGENCE IN RUNNING TRAINS.—It is such negligence on the part of a railroad company to run accommodation trains through a city at a dangerous rate of speed to fair-grounds in the outskirts thereof while the fair is in progress, and to use for such purpose an inferior switch-engine, run by a fireman instead of by a competent engineer, as will entitle a person to recover for personal injuries received while prudently attempting to rescue another in danger of being run over. *Peyton v. Texas etc. Ry Co.*, 430.

2. **LIABILITY FOR KILLING STOCK.** — CONTRIBUTORY NEGLIGENCE on the part of plaintiff cannot be inferred from the fact that his stock was killed by a railroad train in his inclosed pasture, through which the railroad ran. *Harmond v. Columbia etc. R. R. Co.*, 843.
3. **LIABILITY OF, FOR FIRE FROM ESCAPE OF SPARKS** — BURDEN OF PROOF. — In order to recover for loss by fire from the escape of sparks from an engine equipped with the most effective and improved appliances to prevent the escape of fire, the burden of proof is upon the plaintiff, and must be very positive, strong, and convincing, to establish negligence on the part of the railroad company. *Meyer v. Vicksburg etc. R. R. Co.*, 406.
4. **WHEN LIABLE FOR LOSS BY FIRE FROM ESCAPING SPARKS.** — Where a railroad company builds a platform at a flag-station, for the purpose of receiving and shipping freight, and under its course of business induces the placing of freight there to be shipped by the next train, a failure on the part of the company to ship at the proper time renders it liable for the subsequent loss of freight on the platform, destroyed by fire escaping from its engines. *Id.*
- LIABILITY OF, FOR FIRE.** — A railroad corporation is not answerable for damages resulting from fire, started at a point not on its roadway, by sparks emitted from the chimney of one of its locomotives, if the corporation exercised its rights in a lawful manner, and with reasonable care and skill. *Bernard v. Richmond etc. R. R. Co.*, 103.
6. **PRESUMPTION OF NEGLIGENCE FROM A FIRE STARTED.** — From the fact that a fire is started by sparks from the chimney of a locomotive, no presumption arises that the corporation operating such locomotive was guilty of negligence. *Id.*
7. **INJUNCTION.** — MANDATORY INJUNCTION MAY ISSUE TO COMPEL A RAILWAY CORPORATION to put in suitable condition for travel a public highway which has been rendered practically unfit for use by the construction of a railway track, and an embankment on which track rests; and the fact that the city might itself do the work, and recover the expenses thereof from the railway corporation, will not prevent the issuing of the writ. *Oshkosh v. Milwaukee etc. R. R. Co.*, 175.
8. **DUTY OF CABLE-RAILWAY COMPANY RUNNING CARS ON CITY STREETS.** — A cable-railway company operating dangerous machinery at a rapid speed on and along the public streets of a city is in law bound to know that men, women, and children have an equal right to the use of the highway, and will be upon it, and its servants are bound to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the streets. *Winters v. Kansas City C. R'y Co.*, 591.
- CARE DEMANDED OF GRIPMAN ON CABLE-CAR TURNING CURVE IN STREET.** — It is not sufficient care on the part of a gripman on a cable-car, on approaching a curve in a street, to ring the bell, and, observing that the way is clear in front, to go ahead, neither looking to the right nor left. *Id.*
10. **RAILWAY WHOSE CARS ARE PROPELLED BY DUMMY-ENGINE IS ADDITIONAL SERVITUDE ON HIGHWAY.** — A railway constructed by authority, on a public street or road, whose cars, used for carrying passengers only, are propelled by a dummy steam-engine, is an additional burden or servitude on such street or highway to that contemplated in the original dedication of the land to public use, and the owner of the fee in the street or highway is entitled to compensation as for a taking of his property for public use. *Street R'y Co. v. Doyle*, 933.

See CARRIERS; EMINENT DOMAIN, 3-5; NEGLIGENCE; WITNESSES, 4.

RECEIVERS.

RECEIVER IS QUASI TRUSTEE, holding the fund for the benefit of whoever may eventually establish title thereto. *King v. Goodwin*, 377.

REDEMPTION.

See MORTGAGES, 9, 10.

REFORMATION OF INSTRUMENTS.

See CONTRACTS, 12; WILLS, 1, 2.

REGISTRATION.

See AUCTION AND AUCTIONEERS; DEEDS, 4-6.

REIMBURSEMENT.

See SURETSHIP, 1.

REMAINDERS.

See DEEDS, 10; DESCENT, 2; TRUSTS AND TRUSTEES, 2.

RENTS AND PROFITS.

See EJECTORS AND ADMINISTRATORS, 3; LANDLORD AND TENANT, 4; MORTGAGES, 6-12, 14.

RESCISSION OF CONTRACTS.

See VENDOR AND VENUEE, 10-12.

RES GESTÆ.

See HUSBAND AND WIFE, 4; WILLS, 11.

RESIDENCE.

See DOMICILE, 1, 2.

RESTITUTION.

See JUDGMENTS AND DECREES, 3-5; MANDAMUS, 1.

REVERSED JUDGMENTS.

See JUDGMENTS AND DECREES, 3-5.

REVOCATION.

See WILLS, 17.

RIVERS.

See WATERCOURSES, 4, 5.

RIPARIAN RIGHTS.

See EMINENT DOMAIN, 1, 2; WATERCOURSES.

ROBBERY.

See CRIMINAL LAW, 1.

SALES.

1. **SALE OR BAILMENT.**—Whether an agreement between parties is designed, under the device of a consignment for sale, to preserve in the vendor a lien upon goods, or whether it constitutes a bailment, is a question of law for the court, though the question whether there was actual fraud or intent to defraud creditors in entering into the agreement is one of fact for the jury. *Chickering v. Bastress*, 309.
2. **SALE OR BAILMENT.**—When the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment, and the title to the property is not changed. When there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor, the title to the property is changed, and the transaction is a sale. *Id.*
3. **CONTRACT OF SALE RESERVING SECRET LIEN VOID AS TO CREDITORS.**—Whatever the form of the agreement, if its purpose is to cover up a sale and preserve a lien in the vendor for the price of goods, it is void as to his creditors, whether credit was given before or after the delivery of the goods. A consignment for such object is no better than any other device. *Id.*
4. **CONTRACT OF SALE RESERVING SECRET LIEN VOID AS TO CREDITORS.**—Where a party, by means of a contract, but without notice to the world, suffers the real ownership of chattels to be in himself and the ostensible ownership to be in another, the law will postpone the rights of the former to those of the execution or attachment creditors of the latter, because to injure third persons by giving a false credit to such ostensible owners is the natural and probable result of the transaction. *Id.*
5. **REPUDIATION—DAMAGES FOR NON-PERFORMANCE OF CONTRACT.**—Where goods are ordered under a simple bargain and sale, and notice is given by the buyer to the seller not to ship them, in advance of delivery, and before they were separated from the bulk, and set apart to the buyer, such notice is not only a repudiation from the contract of sale, but also a revocation of the carrier's agency to receive them; and the refusal of the buyer to receive the goods when delivery is tendered by the carrier does not make him liable for their contract price, but only for special damages for the refusal to receive them. *Unexcelled Fire-works Co. v. Polites*, 788.
6. **MEASURE OF DAMAGES FOR BREACH OF EXECUTORY CONTRACT.**—When the seller stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages for a breach of the contract of sale, but in the case of an executory contract for the sale of goods not specific, the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery. *Id.*
7. **SALE C. O. D., WHEN COMPLETE.**—Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the sale on the part of the seller is complete, and the purchaser may hold the goods for the price of which he is then liable *Commonwealth v. Fleming*, 763.
8. **SALE C. O. D.—LIABILITY OF CARRIER.**—Where a purchaser orders goods sent him C. O. D., and the order is accepted by the seller, and the goods delivered to the carrier, the latter becomes the agent for the receipt and transmission of their price. The sale is complete on the part of the seller, and whether the carrier receives the price or not at the time of delivery, he is liable to the seller for the price if he does deliver. *Id.*

9. **SALE C. O. D., WHEN COMPLETE.** — Where a seller has received an order from a purchaser to send him goods C. O. D., and the goods are delivered to the carrier, the title does not pass until the delivery of the goods; still, the sale is completed by delivery to the carrier, and the right of the seller to recover the price from the purchaser if he refuses to take them is as complete as if he had taken them and not paid for them. *Id.*
10. **SALE C. O. D., WHEN COMPLETE.** — A licensed liquor dealer who receives an order from a purchaser residing in another county, where the dealer has no license to send him liquor C. O. D., and accepts the order, and delivers the liquor to a carrier under agreement to collect on delivery, cannot be convicted of selling liquor without a license in a county where the purchaser resides, as the sale is complete on the part of the dealer when he delivers the liquor to the carrier at his place of business. *Id.*
11. **FRAUDULENT SALE.** — When goods are sold for one third of their value to one who does not open the packages in which they are, nor make any examination of them, but admits that they are a bankrupt stock, and that he has purchased them at twenty per cent of their value, and who furnishes the vendor with transportation to another city, and admits his flight to parts unknown, the sale is properly adjudged fraudulent as against the vendor's creditors. *Frisk v. Reigelman*, 198.
12. **FRAUDULENT SALES.** — THE FACT THAT THE VENDEE HAS PAID A CONSIDERATION for goods which he claims to have purchased, while it is to be considered in determining the question of fraud, is by no means a controlling fact. *Id.*
13. **PURCHASER, BONA FIDE, WHO IS.** — A purchaser for value, and without notice, from one who was a purchaser with notice, becomes a purchaser *bona fide*, and entitled to protection as such. *London v. Youmans*, 17.
14. **PURCHASER OF PROPERTY WITHOUT NOTICE OF A MORTGAGE THEREON** takes title free therefrom, though his vendor purchased with notice thereof. *Id.*

See CONTRACTS, 9, 10; CORPORATIONS, 37, 42.

SALE OF SEED-COTTON.

See STATUTES, 5.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SERVICE.

See PROCESS.

SERVICES.

SERVICES ARE PRESUMED TO HAVE BEEN GRATUITOUS WHEN RENDERED BY A STEP-DAUGHTER while residing in the family of her step-father, for whose benefit they were rendered, unless she can show an express promise to pay therefor. *Ellis v. Cary*, 125.

See WILLS, 21.

SET-OFF.

1. **SETTING OFF JUDGMENTS.** — A judgment in favor of the defendant may, on motion, by order be set off against a judgment previously rendered

in favor of the plaintiff. The power to so set off judgments is a common-law power, not derived from nor regulated by the statute of set-off or of discount. *Simmons v. Ridd*, 36.

2. JURISDICTION TO SET OFF ONE JUDGMENT AGAINST ANOTHER IS EQUIVOCAL IN ITS NATURE, and the application therefor is addressed to the sound judicial discretion of the court, in the exercise of which equitable rights of persons not parties to the suit will be considered and protected. *Id.*

3. SET-OFF OF ASSIGNED JUDGMENT. — The court will not order a judgment to be set off against one in favor of the defendant, when the plaintiff had assigned it to his attorney to secure the payment of the latter's professional service, and the attorney, when he took the assignment, had no notice of the existence of the judgment which the defendant seeks to set off. *Id.*

See BUILDING ASSOCIATIONS; TRAIL, 5.

SHERIFFS.

See MANDAMUS, 1.

SHERIFF'S DEED.

See LIMITATIONS OF ACTIONS, 2.

SLEEPING-CAR COMPANIES.

See CARRIERS, 14-19.

SPECIFIC PERFORMANCE.

See LANDLORD AND TENANT, 9, 10; VENDOR AND VENUEE, 7, 8.

STATUTES.

1. CONSTRUCTION OF STATUTE. — Statute enacting that persons engaged in blasting rocks shall before each explosion give reasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance, and that whoever violates the law is liable for all damages caused by the explosion, does not give a remedy to workmen employed in the quarry, but was designed only for the protection of persons who, not being engaged in or about the quarry, and being therefore ignorant of their proximity to danger, are in need of warning to retire to a place of safety. *Hare v. McIntire*, 476.
2. DECISION OF COURTS OF STATE CONSTRUING STATUTE THEREOF, WHEN FOLLOWED IN OTHER STATES. — Where the decisions of the courts of Massachusetts have settled what a statute of that state authorizes to be done under it, those decisions are controlling as to the effect and meaning of the statute, and the courts of Maryland will follow them as making a part of the law of the state, no matter whether they are entirely in harmony with decisions of other states upon somewhat similar statutes or not. *Supreme Council v. Green*, 527.
3. CONSTITUTIONAL LAW. — IN DETERMINING WHETHER A STATUTE IS VOID BECAUSE IN CONFLICT with the constitution of the state or of the United States, the courts will resolve every doubt in favor of the validity of the law, and presume that it was passed in good faith to remedy some defect not reached or corrected by previous legislation. *State v. Moore*, 696.

4. A PUBLIC LOCAL LAW, if it operates uniformly, and subjects all persons who come within the defined locality to its provisions, is valid. *Id.*
 5. CONSTITUTIONAL LAW—STATUTE REGULATING SALE OF COTTON IN THE SEED. — A statute is constitutional which declares that it shall be unlawful for any person to sell, deliver, or receive for a price cotton in the seed, where the quantity is less than what is usually contained in a bale, unless such sale shall be in writing, signed by all the parties thereto, and witnessed by two witnesses, and such writing delivered, with a fee, to the nearest justice of the peace, whose duty it is to docket the same on his civil docket for the inspection of all persons. Such statute does not violate either the fourteenth amendment of the constitution of the United States, nor that portion of the constitution of North Carolina forbidding the creation of monopolies or the granting to any man or set of men exclusive or separate emoluments or privileges. *Id.*
- See APPEAL AND ERROR, 1; CONSTITUTIONAL LAW; EXEMPTIONS, 1, 2; INSURANCE, 3.

STATUTE OF FRAUDS.

See BOUNDARIES; LANDLORD AND TENANT, 5-10; SURETYSHIP, 5, 6; WILLS, 19-21.

STATUTE OF USES.

See TRUSTS AND TRUSTEES.

STOCK AND STOCKHOLDERS.

See CORPORATIONS.

STREET-RAILWAY COMPANIES.

See RAILROAD COMPANIES, 8-10.

STREETS.

See MUNICIPAL CORPORATIONS, 6-11.

SUBROGATION.

See INSURANCE, 20; MORTGAGES, 16.

SUBSCRIPTIONS.

See CORPORATIONS, 17, 20, 22-23.

SUBTERRANEAN WATERS.

See WATERCOURSES.

SUMMONS.

See PROCESS.

SURETYSHIP.

1. REIMBURSEMENT OF SURETY. — As a general rule, a surety can recover of the principal only the amount which he has actually paid. *Stone v. Hammell*, 272.

2. **NOTE OF SURETY AS EXTINGUISHMENT OF DEBT.** — A surety, by giving his negotiable note for the debt due by his principal, can only recover the amount thereof from the latter when such note extinguishes the debt of the principal to his creditor. *Id.*
3. **CO-SURETIES — RIGHT TO RECOVER CONTRIBUTION ON OUTLAWED DEBT.** — A co-surety who has contributed his share of the principal's debt to a co-surety, who has satisfied the whole debt, cannot recover the amount so paid in contribution of their principal, when the liability of the latter has been extinguished by the statute of limitations before any payment by either of the sureties. *Id.*
4. **CO-SURETY — STATUTE OF LIMITATIONS AGAINST.** — The liability of a surety for contribution to his co-surety, who has paid the principal debt, is kept alive by the absence of the former from the state; but such absence does not extend the time within which he may recover of his principal the amount so contributed. His right to recover of the principal in such case is barred in two years from the date of payment of the principal debt, unless the obligation is founded upon an instrument in writing. *Id.*
5. **STATUTE OF FRAUDS. — PROMISE BY A STRANGER TO A DEBT TO INDEMNIFY A SURETY** is *prima facie* within the statute of frauds, because it is in effect a promise to answer for the default of the principal debtor. *Welton v. Davis*, 56.
6. **STATUTE OF FRAUDS. — PROMISE OF ONE SURETY TO INDEMNIFY ANOTHER**, if he will become co-surety with him on an official bond, falls within that provision of the statute of frauds which requires that a promise to answer for the default or the misdoing of another must be in writing to be enforceable by an action. Therefore, if the surety to whom the promise was made is compelled to pay the whole debt, he cannot recover of his co-surety who made the promise anything beyond his aliquot share of the loss occasioned by the default of the principal. *Id.*

See APPEAL AND ERROR, 9; HUSBAND AND WIFE, 6, 8, 11.

SURVEYS.

See EVIDENCE, 2.

TAXATION.

1. **ESTOPPEL TO DENY CONSTITUTIONALITY OF LAW.** — A property holder who has signed a petition for a special tax, who has voted for the ordinance levying the tax, and who has entered into the secure enjoyment of all the benefits contemplated and conferred by the same, is estopped from escaping payment of the tax by urging objections to the constitutionality of such ordinance. *Andrus v. Board of Police*, 411.
2. **CONSTITUTIONAL LAW — TAXATION.** — Constitutional provisions are intended to protect citizens from forced contributions levied *ex officio* beyond the powers conferred on the taxing power, but not to protect them from the payment of taxes levied with their free consent and approval, and at their express request. *Id.*

TELEGRAPH COMPANIES.

- FAILURE TO DELIVER MESSAGE — CONTRACT MADE IN FOREIGN STATE.** — An action to recover the statutory penalty for failure to transmit and deliver a telegraphic message cannot be maintained in Indiana, under a contract

made in another state for the transmission and delivery of the message to a point within the former state. *Rogers v. Western Union Tel. Co.*, 373.

TESTAMENTARY CAPACITY.

See WILLS, 14, 15.

TORT-FEASORS.

See HUSBAND AND WIFE, 4.

TORTS.

See PARTNERSHIP, 2; NEGOTIABLE INSTRUMENTS, 3.

TOWN ORDER.

See NEGOTIABLE INSTRUMENTS, 3-5.

TRADE-MARKS.

1. SUCH WORDS AND MARKS as by their own meaning or by association in the public mind indicate, not the quality of an article, but its origin or ownership, the person by whom or the factory in which it was produced, became appropriated in their use exclusively to the originator or owner of such articles. No other person can lawfully use them to designate other similar articles of different origin or ownership. *Symonds v. Jones*, 485.
2. NAME OR INITIALS OF THE ORIGINATOR OR OWNER OF A BUSINESS, when used on labels as trade-marks in the business, may thereby acquire a value, and may be included in the sale of the business, so far, at least, as to prevent the vendor from afterwards using them in like manner on other similar products, to the detriment of the vendee. *Id.*
3. ONE MAY SELL THE RIGHT TO USE HIS OWN NAME in connection with a particular business. *Id.*
4. ONE WHO TRANSFERS A BUSINESS AND THE GOOD-WILL THEREOF, including trade-marks, a part of which is his name or initials, and at the same time enters into an agreement by which he is to be employed as manager of the business, has no right, on being discharged as such manager, to enter upon business on his own account and use such trade-marks therein. *Id.*
5. FRAUDULENT USE OF NAME OF ANOTHER. — One having the right to use a trade-mark, a part of which is the name of another, who formerly conducted the business, must not so use it as to lead the public to believe that the former owner still personally conducts such business; and while he so uses it, equity will not protect him against such former proprietor who resumes the use of his name in a like business; but such relief will be granted, if, before the complaint is filed, a change has been made in the trade-mark and labels, clearly indicating that the ownership of the business has changed, and that the successor of the original proprietor is conducting it. Especially is this true if the improper use of the trade-mark was inadvertent, or was made by persons for whose conduct the plaintiff is not answerable. *Id.*
6. OWNERS OF A TRADE-MARK WHICH INCLUDES THE NAME OF A THIRD PERSON must not so use it, or the labels connected with it, as to lead the public to suppose that the goods on which it is used were manufactured or packed by such third person. *Id.*

TRESPASS.

DAMAGES.—In an action of trespass committed by defendant's employee, exemplary damages cannot be recovered, in the absence of proof of malice or wantonness, or culpable inattention and neglect, on the part of defendant in the conduct of his business. *Kail v. Charters F. G. Co.*, 823.

See CRIMINAL LAW, 8; EMINENT DOMAIN, 3-5.

TRIAL.

1. **MULTIPLICATION OF PRAYERS SUBSTANTIALLY THE SAME**, on subjects upon which the law has been thoroughly well settled, is a practice much to be deprecated. *Agricultural and M. Ass'n v. State*, 507.
2. **INSTRUCTION AT CLOSE OF EVIDENCE CURES FAILURE OF COURT TO RESTRICT TESTIMONY TO CERTAIN PURPOSES WHEN.**—Where the court fails, at the time when they are offered, to instruct the jury that statements made by a testator before and after the making of his will were only competent for the purpose of showing the state of his mind and affections, but does so instruct them at the close of the evidence, this will be sufficient. *Thompson v. Ish*, 552.
3. **ON DEMURRER TO EVIDENCE**, all evidence offered by the party demurring must be omitted from consideration, and he must be treated as admitting all that the jury might infer from the evidence of his adversary. *South West Imp. Co. v. Smith*, 59.
4. **DIRECTING VERDICT.**—The jury may be instructed to find for defendant when plaintiff has wholly failed to prove some material part of his case, and the same rule applies to plaintiff under similar circumstances on the part of defendant. Such an instruction can only be questioned when there was competent evidence tending to support a different verdict from the one directed by the court. *Anthony v. Wheeler*, 281.
5. **AMENDMENT OF DEFECTIVE VERDICT.**—If, in action on two promissory notes and on accounts stated, in which *non assumpsit* and set-off are pleaded, the jury return a sealed verdict for the plaintiff, without specifying the amount for which they find, the court has no power, after the verdict has been duly recorded, and the jury have separated, to amend the verdict, by inserting after the words "for the plaintiff" the words and figures "for the sum of \$5,378.72." *Gaither v. Wilmer*, 542.

See CRIMINAL LAW, 3, 6, 14; WITNESSES.

TRUSTS AND TRUSTEES.

1. **ESTATE IN TRUST—TERMINATION OF—OPERATION OF STATUTE OF USES.**—Where an estate is conveyed to one for the use of or in trust for another, and no duty is imposed upon the trustee for the proper performance of which it is necessary that the legal estate should remain in him, it will pass at once to the *certain-que trust* by operation of the statute of uses. If there is anything remaining for the trustee to do which renders it necessary that he should retain the legal title in order to fully perform the duty imposed by the trust, then the statute will not execute the use, and the legal estate will remain in the trustee. *Snelling v. Lamar*, 835.
- ESTATE IN TRUST—TERMINATION OF—OPERATION OF STATUTE OF USES—DEED TO DEFEAT CONTINGENT REMAINDERS.**—Where an estate is conveyed in trust for the sole use of a married woman during the lives of herself and husband, and if she survives, then for the use of herself

and her children then living so long as she remains the widow of such husband, and upon her remarriage or death, to be divided between her surviving children and the issue of such as were dead, the trust is terminated by the death of the husband, and thereupon the statute executes the use in the surviving widow and children, and their joint deed of feoffment with livery of seisin will defeat the contingent remainders, and vest a good title in the grantees. *Id.*

See CORPORATIONS, 41; RECEIVERS; WILLS, 18.

UNDUE INFLUENCE.

See WILLS, 16.

VACATING SALES.

See JUDICIAL SALES, 2-5, 6.

VENDOR AND VENDEE.

1. **VENDEE IN POSSESSION UNDER A CONTRACT OF PURCHASE HAS THE SAME RIGHTS AS MORTGAGOR IN POSSESSION**, with respect to crops raised by him upon the land which is the subject of the contract. Mortgagor or vendee in possession is the owner of the crops, and entitled to receive the rents and profits without liability to account. It is only when the mortgagee enters for condition broken that he is entitled to the growing crops, and then only because they are incident to his possession. He must account for them, and equity permits him to retain them only when the land is insufficient to discharge the mortgage debt. *Killebrew v. Hines*, 672.
2. **CONSTRUCTION OF CONTRACT.** — A stipulation in a contract of sale, "this contract to hold everything made on the land, unless otherwise agreed by the vendor," cannot be construed as a reservation of crops not then in existence; and if regarded as a mortgage of crops to be grown, cannot be enforced, except under circumstances in which the enforcement of such a mortgage is possible. *Id.*
3. **CONTRACT THAT TITLE SHALL BE FIRST-CLASS, AND SHALL BE PASSED UPON BY THE PURCHASER'S LAWYER**, does not make the decision of such lawyer in favor of the title a condition precedent to the right of the vendor to enforce the contract, if in fact, beyond all dispute, the title is good. *Vought v. Williams*, 634.
4. **FIRST-CLASS TITLE, WHAT IS.** — Stipulation in a contract for the purchase of real estate that the title shall be first-class means nothing more than that it shall be marketable. *Id.*
5. **EVERY PURCHASER OF REAL ESTATE IS ENTITLED TO A MARKETABLE TITLE** free from encumbrances and defects, unless he expressly stipulates to accept a defective title. *Id.*
6. **A MARKETABLE TITLE IS ONE THAT IS FREE FROM REASONABLE DOUBT.** There is reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, but the doubt must be such as affects the value of the land or will interfere with its sale. *Id.*
7. **A PURCHASER WILL NOT BE COMPELLED TO TAKE PROPERTY** the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and if he wishes to sell it, be reasonably certain that no flaw or doubt will arise to disturb its market value. *Id.*

6. ONE WILL NOT BE COMPELLED TO PERFORM A CONTRACT for the purchase of real estate if it appears that his vendor's title depends upon the death of a particular person, the only evidence of whose death is, that, twenty-four years before the trial of the case, being a young unmarried man, in feeble health and of dissipated habits, he left home, from causes unknown, and has not been seen or heard from since, and when, if still living, he is only forty-seven years of age, and there is no title by adverse possession, and the contract stipulated for a first-class title. *Id.*
8. SUBSEQUENT PURCHASER IS PRESUMED to be a purchaser for value, and the burden of proof is on the party attacking the conveyance to show bad faith or want of consideration. *Anthony v. Wheeler*, 281.
10. ACTION FOR MONEY HAD AND RECEIVED IS THE PROPER REMEDY TO RECOVER THE CONSIDERATION PAID by the plaintiff to the defendant for a conveyance of land, if the circumstances are such that the plaintiff has the right to rescind the sale, and has done everything on his part necessary to such rescission. *McKinnon v. Vollmar*, 178.
11. RESCISSION BECAUSE WRONG LANDS WERE POINTED OUT. — If intending purchasers are proceeding, as they suppose, to examine land offered for sale, and an agent of the vendors causes a wrong tract to be pointed out, and a purchase is thereby induced, the vendees have a right to rescind the sale, and recover the purchase-money, though the vendors were not aware of the fraud of their agent in pointing out the wrong land. *Id.*
12. RESCISSION OF SALE FOR MISREPRESENTATION. — If a vendor represents that a tract of land contains a specified large quantity of pine timber, when in fact it has upon it little or no timber, the vendee is entitled to rescind the sale, if the circumstances of the case excused him for not verifying the accuracy of the statement, though the vendor believed it to be true. *Id.*
13. VENDOR'S LIEN — SUFFICIENCY OF COMPLAINT. — A complaint averring that plaintiff sold land to a defendant for a certain sum, a particular portion of which remains due and unpaid, and that at the time of the sale, for reasons known to such defendant, and at his request, the conveyance of the land was made by plaintiff, with the name of another defendant inserted therein, and that the latter knew all the facts of the transaction, is sufficient to warrant the enforcement of the vendor's lien as against the latter defendant. *Burgess v. Fairbanks*, 230.
14. VENDOR'S LIEN — REMEDIES AT LAW NEED NOT BE FIRST EXHAUSTED before a bill in equity to enforce a vendor's lien can be resorted to. *Id.*
15. VENDOR'S LIEN — WHAT DOES NOT CONSTITUTE WAIVER OF — EVIDENCE OF AGENCY. — A vendor does not waive his lien for unpaid purchase-money by taking as security a due-bill executed by a third person as agent for the purchaser; and in such case parol evidence is admissible to show how such bill was received, and who was intended to be bound by it; and after the court has found that it was executed by the purchaser, the finding will be presumed to be supported by the evidence. *Id.*

See ESTOPPEL, 1.

VERDICT.

See CRIMINAL LAW, 4; TRIAL, 4, 5.

VICIOUS ANIMAL.

See MASTER AND SERVANT, 11.

VOLUNTARY CONVEYANCES.

See DEEDS, 3, 4.

WAIVER OF CONDITIONS.

See INSURANCE, 4-6, 9-18.

WARRANTY.

See EVIDENCE, 1.

WATERCOURSES.

1. **RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS.** — The distinction between rights in surface and in subterranean streams is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or acquirable, of their existence, location, and course. The rule of *damnum absque injuria* applies in either case only in the absence of negligence. *Collins v. Chartiers V. G. Co.*, 791.
2. **RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS.** — The use to which a subterranean stream may be lawfully put, if it inflicts damage on surrounding streams or lands, must be natural, proper, free from negligence, and the damage inflicted unavoidable, and not sufficiently obvious to have been foreseen, and prevented by reasonable care and expenditure. *Id.*
4. **RIPARIAN RIGHTS IN SUBTERRANEAN STREAMS.** — If a land-owner, in drilling an oil or gas well, has knowledge of the existence of a stratum of clear water underneath his land, and its flow into wells and springs in the vicinity, and of the existence of a deeper stratum of salt water, which is likely to rise and mingle with the fresh when penetrated by the drill, his failure to use available means to prevent such mingling, by a reasonable expense, is negligence, for which he is liable to the owner of such wells or springs. *Id.*
4. **A RIVER, THOUGH A NON-NAVIGABLE STREAM, IS A HIGHWAY** for all the people of the state, if in its natural state it is capable of floating to market logs and other products of the forest. *Brooks v. Cedar Brook etc. Co.*, 459.
5. **RIPARIAN OWNERS HOLD THEIR LAND SUBJECT TO THE RIGHT OF THE PUBLIC TO USE THE NAVIGABLE RIVERS** flowing through them as public highways, and to improve such rivers as public highways by any appropriate means, whenever this can be done without taking private property. *Id.*

See EMINENT DOMAIN, 1, 2.

WILLS.

1. **EXPLAINING AND REFORMING — ELIMINATION OF WORDS AND PHRASES.** — The chancery powers of a court cannot be invoked, at the instance of a devisee, to reform a will by eliminating words or phrases and supplying others, so as to make the instrument conform to what may be supposed to have been the real intention of the testator. *Sturys v. Work*, 349.
2. **EVIDENCE ADMISSIBLE TO EXPLAIN, BUT NOT TO SHOW INTENTION.** — Extrinsic evidence may be admitted in a proper case, where the effect of it is merely to explain or make certain what the testator has written; but such evidence is never admissible to show what the testator intended to write. *Id.*

2. **CONFLICT BETWEEN WILL AND CODICIL.** — Where the terms of a will clearly give an estate, the words of a codicil must manifest an intent equally clear to revoke it; but when the provisions of the codicil thus expressed are repugnant to provisions contained in the will, the codicil is to be regarded as the expression of the testator's final determination upon the subject. *Id.*
4. **CONSTRUCTION — EFFECT OF CODICIL.** — Where a clause in a will, in clear and decisive language, gives all the residue of an estate to the testator's two sons, and a later clause or codicil, equally clear and decisive, gives the same subject-matter to all of his children, share and share alike, the codicil must control, as being the final expression of the testator. *Id.*
3. **FAILURE OF DEVISE AS TO ONE — EFFECT AS TO OTHERS.** — Where an estate is given by will to two, and the part given to one fails from any cause, that part, without an express and fresh disposition of it, will not go in augmentation of the part given to the other, but will fall into the residue, or go to the next of kin. *Id.*
6. **DEVISE TO ONE DIMINISHED — EFFECT AS TO OTHERS.** — Where a tract of land or sum of money is devised in specific proportions to two persons, and the share given to one is afterwards diminished, or entirely revoked, such share or part thereof will not, in the absence of some express words, go to the other. *Id.*
7. **AN HEIR CANNOT BE DISINHERITED EXCEPT BY THE TESTATOR LEAVING HIS PROPERTY TO ANOTHER.** — Therefore, a will in which a father declares that it is his will that one of his sons be excluded from all of his estate, and have no heirship in the same, but in which no devise or bequest is made to any other person, does not divest the son of any part of his father's estate, and is not, unless it appoints an executor, entitled to admission to probate as a will. *Coffman v. Coffman*, 69.
8. **OMISSION OF NAME OF CHILD.** — DECLARATION OF INTENT of a testator to disinherit a child whose name is omitted from his will is inadmissible. Such intent must appear from the words of the will. *Estate of Stevens*, 252.
9. **TO DISINHERIT A CHILD WHOSE NAME IS OMITTED FROM A WILL**, an intention so to do must appear from words on the face of the will indicating such intent, directly or by implication equally as strong that the testator had the child omitted in his mind, and so having him, had omitted to make any mention of him. *Id.*
10. **PAROL EVIDENCE IS ADMISSIBLE** to show who was the person whom the testator designated by a particular name. *Phillips v. Ferguson*, 78.
11. **STATEMENTS OF TESTATOR AT, BEFORE, AND AFTER MAKING WILL, WHEN AND FOR WHAT PURPOSES ADMISSIBLE.** — When the testamentary capacity of a testator, and the question of undue influence exerted upon him, are in issue, it becomes material to know what were his previous purposes, intentions, and state of mind; and statements made by him at, before, and after the making of the will in question are competent evidence for these purposes. And it is not essential that those statements should be of the *res gestæ*, to render them admissible, though their value as evidence diminishes, of course, in proportion as they are remote from the date of the will. *Thompson v. Ish*, 552.
12. **TESTIMONY AS TO CONTENTS OF PRIOR WILL IS ADMISSIBLE** for the purpose of showing the fixed purpose and intention of the testator at the time of its execution, when the two wills are substantially the same,

- and the issues are want of testamentary capacity, and undue influence. *Id.*
12. EVIDENCE THAT SOME OF TESTATOR'S CHILDREN WERE IN GOOD CIRCUMSTANCES, AND OTHERS NOT, is admissible, upon a trial to determine the validity of a will, for the purpose of placing the triers as nearly as possible in the position of the testator, and enabling them to consider all of the evidence from his point of view at the time he made the will. *Id.*
14. TESTAMENTARY CAPACITY CANNOT BE PROVED BY NEIGHBORHOOD RUMORS; and the testimony of a witness that the testatrix was "known to the community as a strong-minded woman" should be excluded. Its improper admission, however, will not call for a reversal, when there has been a great amount of competent testimony to the same effect. *Id.*
15. TESTATOR IS OF SOUND AND DISPOSING MIND when he knows that he is disposing of his property by will, to whom he is giving it, and the general nature and character of the property. *Id.*
16. UNDUE INFLUENCE, WHAT IS NOT. — The influence which a child may acquire from association with and attention and acts of kindness to a parent, while he has power to deliberate and estimate the inducements, will not avoid the will of the parent, if the influence is exerted in a fair and reasonable manner, and without fraud or deception. The influence of one occupying such relation to the testator, to avoid the will, must be such as to overreach and destroy the free agency and will power of the testator. *Id.*
17. PRIOR REVOKED WILL IS ADMISSIBLE IN EVIDENCE TO SHOW FIXED PURPOSE AND INTENTION OF TESTATOR at that time as to the disposition of his property, whether such will was formal in its execution or not. *Id.*
18. CONSTRUCTION OF WILL. — Where a testator bequeaths to a trustee a sum of money to be held in trust, and the income to be paid to a married woman, "for the sole use of herself and her children during the term of her natural life, this trust to continue until her youngest child then alive attain to the age of twenty-one years, should she herself die previous to that time, when said trust fund is to go to her child or children then alive, in equal proportions," — 1. The words "for the sole use of herself and her children" did not give the children any estate in the property bequeathed. They showed that their support and maintenance were objects for which the testator desired to provide, but the mode which he adopted for securing this result was the gift to her of the income during her life. 2. The beneficiary having died before her youngest child attained the age of twenty-one years, the trust was to continue until it reached that age, and then the fund was to be divided equally among the children living at that time. 3. The income accruing after the death of the beneficiary was not to accumulate until the time of division, but the children were entitled to equal shares of such income until the time of division should arrive. 4. The beneficiary was entitled to the income during her life, and the trustee had no authority to use any portion of it to repair the depreciation of the principal. 5. The portion of such income which was converted by the trustee into principal belongs to the personal estate of the beneficiary, and must be delivered to her administrator. 6. But no loss ought to fall upon the trustee from his having so invested the income, since the beneficiary received the benefit of the investment during her life, and the delivery of the investment to her

- administrator will protect her personal estate from harm, and ought therefore to be created to the trustee as income paid by him. *Whitebridge v. Williams*, 513.
19. **STATUTE OF FRAUDS. — AGREEMENT TO MAKE A DEVISE OF LAND IN CONSIDERATION OF SERVICES TO BE RENDERED** is within the statute of frauds, and therefore not enforceable, though the services have been performed in reliance thereon. The same rule applies when the agreement is to devise land and bequeath personalty, because the agreement being indivisible, and failing in part, the whole fails. *Ellis v. Cary*, 125.
20. **STATUTE OF FRAUDS — PART PERFORMANCE. — AGREEMENT TO DEVISE REAL ESTATE IN CONSIDERATION OF SERVICES TO BE PERFORMED** is not taken out of the operation of the statute of frauds by the fact that the services are afterwards performed as stipulated, and the person performing them is in possession of the land at the death of the owner, where he was not put in possession under such an agreement, and such possession had no necessary reference thereto. *Id.*
21. **DEVISE, FAILURE TO MAKE, AS AGREED UPON. — QUANTUM MERUIT MAY BE MAINTAINED FOR SERVICES RENDERED TO A STEP-FATHER** by his step-daughter, in consideration of an agreement that the former would devise and bequeath his real and personal property to the latter, the step-father having died without having kept his agreement, and it being void under the statute of frauds, because not in writing. *Id.*
22. **CONDITION PRECEDENT IN RESTRAINT OF MARRIAGE**, and under the operation of which the estate, because of the marriage, never vests, is valid. Therefore if the will declares that if any of the testator's children marry into a designated family such children shall not share in a particular devise, and afterwards, in the lifetime of the testator, a child marries into such a family, it never acquires any interest in the devise. With respect to bequests of personalty, the rule is the same if the restraint is partial and reasonable, but the condition is disregarded if the restraint is general or unreasonable. *Phillips v. Ferguson*, 78.
23. **CONDITION IN RESTRAINT OF MARRIAGE IS REASONABLE** if it merely tends to restrain children from marrying into the family of a person designated. The word "family," as here used, means children of the person named, whether adults or minors. *Id.*
24. **CONVERSION OF PERSONALTY INTO REALTY. — MONEY DIRECTED TO BE LAID OUT IN LAND** must be considered as real estate, unless the object of the conversion fails, and then, to the extent of such failure, the undisposed portion of the fund remains unconverted. *Id.*
25. **WILL OF MARRIED WOMAN — SUFFICIENCY OF SIGNATURE. — A writing clearly testamentary in character, though wanting the form of a will, but admitted to be entirely in the handwriting of a deceased married woman, and attested at the end by the signature "Harriet," admitted to have been made by her, is valid as her will under the Pennsylvania statute of 1837 enabling married women to execute their will as if sole.** *Estate of Knox*, 798.
26. **WILL OF MARRIED WOMAN — CONSTRUCTION — SUFFICIENCY OF SIGNATURE. — A writing in lead-pencil, made by a married woman, wanting the form of a will, and written in the form of a letter, signed "Harriet," and addressed to no one by name, but clearly intended for her mother, or such of her family as should assume control of her property after her death, requesting that certain property be given to persons named, admitted to be in her handwriting, and attested at the end by such signa-**

ture made by her in the form which she habitually used, is valid as her last will. *Id.*

See DESCENT, 1.

WITNESSES.

1. WITNESS MAY BE RECALLED TO LAY FOUNDATION FOR HIS IMPEACHMENT as to statements made by him subsequent to the time when he gave his testimony, although he had been discharged as a witness. *Thompson v. Ish*, 552.
2. QUALIFICATION OF WITNESS TO GIVE EXPERT TESTIMONY. — It is for the court to determine, in the first instance, whether a witness offered as an expert possesses the proper qualifications; but the value of the testimony he may give is a question for the jury, and depends upon the skill of the witness in his profession, the extent of which may be shown by one who speaks from knowledge. *Id.*
3. EXPERT EVIDENCE — REFERENCE TO MEDICAL BOOKS. — A medical expert may be asked, on cross-examination, whether certain statements read from a book were not made by certain writers on surgery, in order to test the learning of the witness, when the books referred to are approved authorities upon the subjects under investigation. *Hess v. Lowrey*, 355.
4. COMPETENCY OF NON-EXPERTS TO REPLY TO EXPERT TESTIMONY. — Where, in an action against a railroad company to recover for the killing of cattle on the track, the inquiry becomes material as to within what distance the train could be stopped, and experts testify on that point, non-experts who propose, in reply, to speak from their own observation and experience on the same subject are competent witnesses, and their testimony should go to the jury. *Harmon v. Columbia etc. R. R. Co.*, 843.

See CRIMINAL LAW, 14; EVIDENCE, 2; HUSBAND AND WIFE, 12; PHYSICIANS AND SURGEONS, 1.

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